Supreme Court, U.S.
FILED
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MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1978

Number 78-1026

David E. Klingaman, trading as
Banner Sightseeing Company, and
Joy R. Klingaman

Petitioners

vs.

Martin L. Sommers

Respondent

PETITION FOR A WRIT OF CERTIORARI TO:
1. STATE OF FLORIDA, SUPREME COURT
2. STATE OF FLORIDA, DISTRICT COURT OF APPEAL, SECOND DISTRICT

David E. Klingaman, trading as
Banner Sightseeing Company, and
Joy R. Klingaman
Petitioners Pro Se
11700 Charles Road
Silver Spring, Maryland 20906
Telephone: 202-942-1976

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IDENTIFICATION OF COURTS

Federal

U.S. Supreme Court - Supreme Court of the United States

State

Fla. Supreme Court - State of Florida
Supreme Court
Tallahassee

Fla. District Court - State of Florida
District Court of Appeal
Second District
Lakeland

Fla. Circuit Court - State of Florida
Twentieth Judicial Circuit
Collier County
Naples

IDENTIFICATION OF PARTIES

U.S. Supreme Court

Banner - Petitioner David E. Klingaman, trading as Banner Sightseeing Company, a sole proprietorship
11700 Charles Road
Silver Spring, Maryland 20906

J. R. Klingaman - Petitioner Joy R. Klingaman, wife of David E. Klingaman but not an owner or agent of Banner Sightseeing Company
11700 Charles Road
Silver Spring, Maryland 20906

M. L. Sommers - Respondent Martin L. Sommers
1380 Barbizon Lane
Naples, Florida 33942

Fla. Supreme Court

Banner and J. R. Klingaman - Petitioners
M. L. Sommers - Respondent

Fla. District Court

Banner and J. R. Klingaman - Appellants
M. L. Sommers - Appellee

Fla. Circuit Court

Banner and J. R. Klingaman - Plaintiffs/Counterdefendants
M. L. Sommers - Defendant/Counterplaintiff

APPEARANCES

U.S. Supreme Court

Banner - Pro Se
J. R. Klingaman - Pro Se
M. L. Sommers - Unknown to Petitioners

Fla. Supreme Court

Banner - Pro Se
J. R. Klingaman - Pro Se
M. L. Sommers - Richard D. Sparkman, Esq.
Sparkman and Hamilton
2432 Davis Boulevard
Naples, Florida 33941

Fla. District Court

Banner - Eugene H. Clay, Esq.
Isphording, Payne and Muirhead
1859 Main Street
Sarasota, Florida 33577

J. R. Klingaman - Eugene H. Clay, Esq.
M. L. Sommers - Richard D. Sparkman, Esq.

Fla. Circuit Court

Banner - John F. Stanley, Esq.
Vega, Brown and Nichols
2660 Airport Road
Naples, Florida 33940

J. R. Klingaman - Pro Se, specially only
M. L. Sommers - Richard D. Sparkman, Esq.

OPINIONS BELOW

1. July 26, 1978: Fla. Supreme Court denied Petitioners' Petition for Certiorari Jurisdiction as to the items argued herein regarding due process of law. (A. 1) (361 So.2d 833) A motion for rehearing is not permitted.

2. January 20, 1978: Fla. District Court affirmed all lower Orders and the Final Judgment which Petitioners attacked as listed in item 3 below. (A. 2) March 6, 1978: Rehearing denied. (A. 3) (354 So.2d 1219)

3. Fla. Circuit Court adjudged and ordered as follows:

a. April 25, 1977: Final Judgment for money against Petitioners. (A. 4)

b. May 27, 1976: Order adding J. R. Klingaman as a Plaintiff. (A. 5)

c. February 14, 1977: Order for Banner to return boat to Florida and for Petitioners to pay money to M. L. Sommers. (A. 7)

d. March 15, 1977: Order denying Banner's Motion for Rehearing. (A. 9)

e. April 12, 1977: Order denying J. R. Klingaman's Motion to Remove Name from Action. (A. 10)

JURISDICTION

Grounds for invoking the jurisdiction of the U.S. Supreme Court include:

1. The Florida Courts have decided a Federal question of substance in conflict with applicable decisions of the U.S. Supreme Court in that the Florida Courts repeatedly denied both Petitioners due process of law, a right specially set up under the Constitution of the United States.

2. The Florida Courts have decided a Federal question of substance for which Petitioners can find no previous determination in the U.S. Supreme Court, specifically regarding whether a State Court has the authority and/or jurisdiction to order a nonresident to remove an item of personal property from the property's location in another State.

The dates of the Final Judgment and Orders sought to be reviewed and the respective dates of entry are:

1. Fla. Supreme Court: Order of July 26, 1978. No other date specified thereon.

2. Fla. District Court: Order of January 20, 1978. No other date specified thereon.

3. Fla. Circuit Court:

a. Final Judgment ordered April 25, 1977. Entered April 28, 1977.

b. Order of May 27, 1976. Entered May 28, 1976.

c. Order of February 14, 1977. Date of entry not specified thereon.

d. Order of April 12, 1977. Entered April 12, 1977.

Dates of Orders respecting rehearing are:

1. Fla. Supreme Court: July 26, 1978, to the effect that no motion for rehearing is permitted.

2. Fla. District Court: March 6, 1978.

3. Fla. Circuit Court: March 15, 1977.

The date of the U.S. Supreme Court Order granting an extension of time within which to petition for certiorari is October 16, 1978. No other terms were stated to Petitioners.

The statutory provision believed to confer on the U.S. Supreme Court jurisdiction to review the aforesaid Final Judgment and Orders of Florida Courts by Writ of Certiorari is 28 U.S.C. 1257.

QUESTIONS PRESENTED FOR REVIEW

1. Is due process of law observed when:

a. A person is added as a Plaintiff in a civil equity action with no notice whatever and no opportunity to be heard thereon and said person later becomes a counterdefendant with a money judgment entered against her despite her repeated pre-judgment objections, promptly voiced upon being informed of how her name was added to the action, to the effect that she is not even a proper party?

b. A Court fails to make any inquiry whatever into, or require proof of, an attorney's apparent authority to appear for a certain person after said person, well before judgment was entered against her, repeatedly denied the existence of such authority promptly upon being informed that said attorney added her as a party on said attorney's own initiative?

c. A person is carefully not found to be liable for certain alleged debts but nevertheless is ordered to pay said debts?

d. A Court allows a movant to take a completely different direction in a hearing from the issues raised in the movant's pleadings and the Court immediately holds

a hearing and, over the adversary's repeated objections that the evidence being presented by the movant is not admissible regarding the issues raised in the pleadings, admits testimony and other evidence relevant to the different direction, resulting in an order for the adversary to perform and to pay money to the movant even though the adversary has had no notice whatever of the new direction and no opportunity whatever, let alone a fair one, to prepare a defense?

e. The Courts completely and flagrantly disregard a well-defined procedure for determining the timeliness of a post-trial motion and refuse to correct same, even after receiving certification from the Court Clerk that the previously stamped receipt date, which was the sole basis of denial, was wrong and that the actual date of receipt was one which the Court, by its comments, would have deemed timely?

2. Does a State Court have the authority and/or jurisdiction to order a nonresident of said State to remove an item of personal property from its location in another State or from a Federal enclave entirely within the boundaries of another State?

CONSTITUTIONAL PROVISIONS, LAWS AND RULES

1. Provisions from the U.S. Constitution, Fourteenth Amendment:

"No State.....shall deprive any person of.....property without due process of law." (U.S.C., 1970, Vol. 1, Page LIII)

2. Provisions from the Florida Constitution, 1968, Article I, Section 9:

"No person shall be deprived of..... property without due process of law....." (F.S.A., Vol. 25, Page 668)

3. Provisions from the U.S. Code, Title 28, Section 1257:

"Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court.....by writ of certiorari.....where any title, right, privilege or immunity is specially set up or claimed under the Constitution.....of.....the United States." (U.S.C., 1970, Vol. 7, Page 7561)

4. Provisions from the Florida Rules of Court for Civil Procedure:

a. Rule 1.250(c):

"Adding Parties. Parties may be added once as a matter of course within the same time that pleadings can be so amended under Rule 1.190(a). If amendment by leave of court or stipulation of the parties is permitted, parties

may be added in the amended pleading without further order of court. Pleadings may be added by order of court on its own initiative or on motion of any party at any stage of the action and on such terms as are just." (Fla. Rules of Court, West's Desk Copy, 1979, Pages 45-46)

b. Rule 1.530(b):

"Time for Motion. A motion for a new trial or rehearing shall be served not later than 10 days after the rendition of verdict in a jury action or the entry of judgment in a non-jury trial." (Fla. Rules of Court, West's Desk Copy, 1979, Page 91)

5. Provisions from the Florida Rules of Court for Appellate Procedure, 1977, Rule 9.030(a)(2)(A)(iii):

"Jurisdiction of Supreme Court. Certiorari Jurisdiction. The certiorari jurisdiction of the Supreme Court may be sought to review decisions of district courts of appeal that are in direct conflict with a decision of any district court of appeal or of the Supreme Court on the same point of law." (Fla. Rules of Court, West's Desk Copy, 1979, Pages 761-762)

WHY WRIT TO TWO COURTS IS SOUGHT

A Writ of Certiorari to both the Fla. Supreme Court and the Fla. District Court is sought because:

1. In Florida, the courts of appeal are final appellate courts of last resort except in a limited area in which the supreme court has been endowed by the Constitution with the power to review by appeal or certiorari, and the supreme court's jurisdiction to review by certiorari the decisions of appeal is limited to three classes of cases enumerated in the Constitution. (5 Fla.Jur., Certiorari, Sec. 6.1) In the instant case, the only way that jurisdiction of the Fla. Supreme Court could be sought was a petition for certiorari jurisdiction on the basis that the Order by the Fla. District Court was "in direct conflict with a decision of any district court of appeal or of the Supreme Court on the same point of law." (Fla.R.App.P. 9.030(a)(2)(A)(iii)) Since the Fla. Supreme Court jurisdiction was limited but the Fla. District Court jurisdiction was general, one school of thought could be that the petition sought in the U.S. Supreme Court should be directed to the highest State Court of general

jurisdiction. Therefore, out of an abundance of caution, Petitioners seek a Writ of Certiorari to the Fla. District Court as well as the Fla. Supreme Court.

2. Final judgments or decrees "rendered by the highest court of a State in which a decision could be had" may be reviewed by the U.S. Supreme Court by Writ of Certiorari under certain circumstances. (28 U.S.C. 1257) For the matters discussed herein regarding due process of law, the certiorari jurisdiction of the Fla. Supreme Court was sought but denied. However, for the matter discussed herein regarding whether a State Court has the jurisdiction to order a nonresident to remove an item of personal property from another State, the jurisdiction of the Fla. Supreme Court could not be sought because no Florida decision of which Petitioners are aware conflicts with that by the Fla. Circuit Court as affirmed by the Fla. District Court. Thus, the Order by the Florida District Court in the instant case was rendered by said "highest court of a State". (Fort v. City of Miami Beach, 389 U.S. 918) Therefore, Petitioners seek a Writ of Certiorari to both the Fla. Supreme and District Courts.

GENERAL STATEMENT OF THE CASE

(This is only a general description of the occurrences. In the following section is a detailed chronology of the case. In the Argument, facts are elaborated upon as necessary.)

This is a civil case in equity involving a money judgment against Banner and J. R. Klingaman. The case began on January 15, 1976, as a Complaint in the Fla. Circuit Court by Banner for specific performance, namely delivery to Banner of a boat owned by M. L. Sommers for use by Banner and M. L. Sommers in a joint venture for a sightseeing boat service in Washington, D.C. A trial was conducted on June 30, 1976; said specific performance and nothing else was granted on July 9, 1976, by the Fla. Circuit Court. The boat was delivered to Banner in Naples, Fla., on August 14, 1976, and taken to Washington, D.C., by Banner on an incredible 10-week voyage, arriving there on October 25, 1976.

Meanwhile, with no prior notice and no opportunity to be heard, J. R. Klingaman was added as a Plaintiff on May 28, 1976, but did not have full correct knowledge until February 26, 1977, of how such addi-

tion occurred. From May 1976 until his withdrawal in March 1977, J. F. Stanley apparently appeared sometimes for J. R. Klingaman but such appearance was completely without authorization.

After it became impossible to timely return said boat to Florida in late 1976 due to previously hidden mechanical defects necessitating major repairs and due to unusually poor weather conditions, M. L. Sommers moved on December 20, 1976, in the Fla. Circuit Court to be relieved of the judgment for said specific performance on the basis of alleged fraud and misrepresentation by Banner at the aforesaid trial. At the hearing on January 10, 1977, the Fla. Circuit Court did an about-face from the issues raised in the pleadings and, admitting evidence over Banner's repeated objections that such evidence was not admissible under the circumstances, ordered that Banner return the boat to Florida and that Banner pay alleged past due "rent" (which word never appears in the relevant Agreement between Banner and M. L. Sommers) and pro rata insurance premiums to M. L. Sommers; nobody else was ordered to do anything.

On February 14, 1977, the Fla. Circuit Court filed a written Order pursuant to the hearing of January 10, 1977, in which only Banner was found to be in breach of contract for not returning the boat to Florida and in which only Banner was found liable to pay so-called "rent" and pro rata insurance premiums to M. L. Sommers. In the same document, Banner was ordered to return the boat to Florida but both Banner and J. R. Klingaman were ordered to pay the "rent" and pro rata insurance premiums to M. L. Sommers. No explanation has ever been made as to why J. R. Klingaman was suddenly ordered to pay anything to anybody after very carefully not being found liable for such payments.

A Motion for Rehearing regarding the Order of February 14, 1977, was filed on February 24, 1977, and was denied by the Fla. Circuit Court on March 15, 1977, solely because the Court thought that it had been filed one day late. The Clerk did not stamp said Motion RECEIVED until February 25, 1977, but said Clerk later certified that said Motion had indeed been filed on February 24, 1977, and thus within the 10-day limit which the Court apparently but wrong-

ly believed to be critical. (The critical act in Florida is service, not filing.)

Meanwhile, from January 29, 1977, to April 4, 1977, J. R. Klingaman sent four documents, including an appropriate Motion, to the Fla. Circuit Court seeking to have her name removed from the case but said Motion was denied on April 12, 1977, without explanation.

Without either Banner or J. R. Klingaman ever having his/her day in Court, said Order of February 14, 1977, was apparently transformed in the Fla. Circuit Court on April 25, 1977, into a money judgment for $11,566.67 in favor of M. L. Sommers against both Banner and J. R. Klingaman. Said judgment was entered on April 28, 1977.

In execution on said judgment, M. L. Sommers caused a quarter-acre lot in Florida owned jointly by David E. Klingaman and J. R. Klingaman to be sold at auction on June 30, 1977; M. L. Sommers bought it himself for $100. Also, an escrow fund of Banner being held in the Fla. Circuit Court Registry pursuant to the Agreement was ordered on May 8, 1978, released to M. L. Sommers even though said fund was for other purposes.

Said money judgment and all attacked Orders were affirmed in the Fla. District Court on January 20, 1978; rehearing in the Fla. District Court was denied on March 6, 1978. Certiorari was denied on July 26, 1978, in the Fla. Supreme Court, wherein a Motion for Rehearing is not permitted.

Repeated lack of due process of law and the Florida Courts' retaining jurisdiction over a nonresident to order him to remove an item of personal property from another State are the reasons for both Petitioners' herewith seeking a Writ of Certiorari in the U.S. Supreme Court.

CHRONOLOGICAL STATEMENT OF THE CASE

1975

March 9 - Banner and M. L. Sommers executed an Agreement for a joint venture wherein Banner would use M. L. Sommers' boat ERIK (U.S. Coast Guard Official Number 527551) to operate a sightseeing boat service in Washington, D.C. (R. 80-87) Pertinent provisions of said Agreement are:

1. Banner would use the boat on a seasonal basis from April to November, called the "lease period".

2. The Agreement was basically for 1975 but was renewable annually for four years at Banner's sole option provided Banner notified M. L. Sommers in writing before January 1 of each year.

3. Boat would be delivered in good hull and mechanical condition by M. L. Sommers to Banner at the beginning of each season in Naples, Florida, where the boat was located. Boat would be returned at the end of each season by Banner to Naples.

4. Banner would be responsible for maintenance and repairs due only to normal wear and tear while Banner had the boat and to Banner's negligence.

5. Banner would pay to M. L. Sommers 10%

of the gross amount received by Banner and Banner's agents for sightseeing boat services and other cruises by Banner during the "lease period". The minimum such amount each year would be calculated for the actual number of days in the "lease period" at the rate of $1,500 per month.

6. For each year that Banner uses the boat, Banner would make an initial advance payment of $750 and a payment of $2,250 upon delivery of the boat to Banner. Both of said payments would be credited toward the aforesaid percentage of the gross amount. Thereafter, Banner would pay $1,500 per month to M. L. Sommers until the full minimum fee for the "lease period" is paid.

7. In the event that the 10% of the gross exceeds the minimum fee for any "lease period", Banner would pay to M. L. Sommers the difference within 30 days after the end of the "lease period".

8. Banner and M. L. Sommers would jointly purchase boat insurance with the premiums prorated between the parties in accordance with the "lease period". Full reimbursement would be made by one party to the other party for the first party's pro rata share of the premium within three days af-

ter receiving proof of insurance coverage.

9. Banner would place $1,500 in escrow with an unbiased third party each year, said escrow to be applied against:

a. Final settlement per item 7.

b. Return of the boat if Banner fails to return it and M. L. Sommers has to retrieve it.

c. Repairs by M. L. Sommers necessitated by Banner's negligence if Banner does not pay M. L. Sommers directly for said repairs within 30 days after Banner receives substantiation of the amounts claimed. Unclaimed escrow funds may be withdrawn by Banner within 60 days after the end of each "lease period".

10. M. L. Sommers would have the right to pick up the boat from Banner not earlier than 21 days after default of any payment due by Banner to M. L. Sommers if settlement of such defaulted payment has not meanwhile been made.

11. Notwithstanding any other terms, Agreement would not be effective until such time as Banner has received all final permits.

June 25 to July 7 - M. L. Sommers repeatedly breached said Agreement by demand-

ing additional terms and conditions unacceptable to Banner before M. L. Sommers would deliver the boat to Banner. (R. 149-325 in transcript of trial on June 30, 1976)

July 8-11 - Having obtained all necessary permits or being assured that they were forthcoming, Banner visited Naples in order to take delivery of the boat but M. L. Sommers steadfastly refused to honor the Agreement by demanding additional unacceptable terms and conditions. Banner left empty-handed. (Ibid.)

July 12 to Approximately December 1 - Banner repeatedly tried unsuccessfully to mitigate the damages by obtaining another boat. (Ibid.)

1976

January 15 - Banner filed Original Complaint in Fla. Circuit Court demanding specific performance on Agreement by M. L. Sommers. (Said Original Complaint is not in the Record because an Amended Complaint was filed before trial.)

April 20 - Banner's deposition was taken for Fla. Circuit Court by M. L. Sommers. (R. 8-35)

April 20 - M. L. Sommers' deposition was

taken for Fla. District Court by Banner. (R. 36-75)

May 7 - M. L. Sommers filed a Motion for Judgment on the Pleadings in Fla. Circuit Court. (R. 6-7)

May 12 - J. F. Stanley filed Motion to Amend (Caption) in Fla. Circuit Court. (R. 76)

May 19 - J. F. Stanley filed Amended Complaint in Fla. Circuit Court. (R. 77-89)

May 28 - Fla. Circuit Court filed Order re aforesaid Motion for Judgment on the Pleadings and aforesaid Motion to Amend. (A. 5, R. 90-91)

June 28 - Banner's Answers to Interrogatories filed in Fla. Circuit Court. (R. 92-97)

June 30 - Trial on specific performance conducted in Fla. Circuit Court. (R. 149-325)

July 12 - Fla. Circuit Court filed Final Judgment awarding specific performance to Banner. (A. 6, R. 98-100)

August 14 - M. L. Sommers delivered the boat to Banner in Naples. (R. 343-397, in transcript of hearing on January 10, 1977)

August 15 - Boat departed Naples for Washington, D.C. (R. 343-397, in transcript

of hearing on January 10, 1977)

October 25 - Boat finally arrived in Washington after many delays due primarily to necessity for numerous repairs and due secondarily to poor weather. (R. 343-397, in transcript of hearing on January 10, 1977)

December 20 - M. L. Sommers filed Amended Motion for Relief from Judgment and Claim for the Escrow Fund in Fla. Circuit Court. (R. 101-103)

1977

January 10 - Hearing in Fla. Circuit Court on Motion for Relief from Judgment and Claim for the Escrow Fund. (R. 343-397)

February 3 - J. R. Klingaman's letter of January 29 asking to have her name removed from case filed in Fla. Circuit Court. (R. 104-106)

February 14 - Fla. Circuit Court filed Order on Motion for Relief from Judgment. (A. 7, R. 107-108)

February 21 - Fla. Circuit Court filed Order re M. L. Sommers' Motion to Reduce Indebtedness to Judgment and Motion to Release Deposit. (A. 8, R. 109)

February 24 - Banner filed Motion in

Fla. Circuit Court regarding hearing of January 10 and Order of February 14. (R. 110-112)

March 4 - J. R. Klingaman filed Motion to Remove Name from Action in Fla. Circuit Court. (R. 113-117)

March 14 - Hearing conducted in Fla. Circuit Court on Motion for Rehearing and Motion to Remove Name from Action. (R. 326-336)

March 15 - Fla. Circuit Court filed Order on Motion for Rehearing. (A. 9, R. 118-119)

March 28 - J. R. Klingaman's Additional Argument and Authority regarding Motion to Remove Name from Action filed in Fla. Circuit Court. (R. 120-128)

March 29 - R. D. Sparkman's first letter regarding J. R. Klingaman's Motion to Remove Name from Action sent to Fla. Circuit Court. (R. 129-131)

March 30 - R. D. Sparkman's second letter regarding J. R. Klingaman's Motion to Remove Name from Action sent to Fla. Circuit Court. (R. 132-133)

April 11 - J. R. Klingaman's Reply and Rebuttal regarding Motion to Remove Name from Action filed in Fla. Circuit Court. (R. 134-146)

April 12 - Fla. Circuit Court filed Order regarding Motion to Remove Name from Action. (A. 10, R. 147)

April 28 - Fla. Circuit Court filed Final Judgment for money in favor of M. L. Sommers against both Banner and J. R. Klingaman. (A. 4, R. 1)

May 10 - Fla. Circuit Court Clerk certified to Fla. District Court the correct date on which Motion for Rehearing had been filed. (R. 148)

May 24 - Banner and J. R. Klingaman filed Notice of Appeal in Fla. Circuit Court regarding Final Judgment, Order of February 14 and J. R. Klingaman's involvement. (R. 2)

June 2 - Banner and J. R. Klingaman filed Assignment of Errors in Fla. Circuit Court pursuant to above Notice of Appeal. (R. 3)

December 1 - Hearing in Fla. District Court.

1978

January 20 - Fla. District Court issued Order affirming Fla. Circuit Court Final Judgment and Orders attacked. (A. 2)

February 16 - Banner and J. R. Klingaman filed Petition for Rehearing in Fla. District Court.

March 6 - Fla. District Court issued Order denying a rehearing. (A. 3)

April 5 - Banner and J. R. Klingaman filed a Notice of Appeal in Fla. District Court.

July 26 - Fla. Supreme Court issued Order denying certiorari jurisdiction. (A. 1)

STATEMENT OF THE CASE REGARDING PRIOR RAISING OF QUESTIONS

No question herein was the subject of the proceedings in the Fla. Circuit Court. Instead, each question arose as a result of said Court's acts and omissions in said proceedings.

Questions 1.a. and 1.b. Raised in Fla. Circuit Court by J. R. Klingaman promptly upon learning exactly how she came to be added to the case and well before judgment was entered against her. Raised via letter, Motion to Remove Name from Action and other documents repeatedly stating that no attorney whatever was authorized to represent her and that she received no notice of any intention to add her and had no opportunity to be heard thereon. (R. 104-106, 113-117, 120-128, 134-146) Motion to Remove Name from Action was denied.

Raised in Fla. District Court timely after above denial via Notice of Interlocutory Appeal and accompanying Assignment of Error as well as Notice of Appeal (R. 2) and Assignment of Error (R. 3) for Final Judgment; because the latter are considered to be inclusive of all interlocutory items, the former are not in the Record. In the

Assignment of Error on Final Judgment, it was pointed out that there is nothing in the Record to indicate that J. R. Klingaman is liable for any breach of contract or other acts or omissions of Banner. Fla. District Court affirmed all attacked Orders. Motion for Rehearing denied.

Raised in the Fla. Supreme Court timely after denial of rehearing. Raised via Notice of Appeal and Petition for Certiorari Jurisdiction, which is by definition not part of the Record. J. R. Klingaman therein pointed out the repeated lack of due process in adding her as a party and in J. F. Stanley's unauthorized appearance. Denied.

Question 1.c. Unable to raise in Fla. Circuit Court because it arose from the hearing leading to Final Judgment and a Motion for Rehearing thereon was denied on a procedural point.

Raised in Fla. District Court timely after denial of Motion to Remove Name from Action via Notice of Interlocutory Appeal and accompanying Assignment of Error as well as Notice of Appeal (R. 2) and Assignment of Error (R. 3) for Final Judgment; because the latter are considered to be inclusive of all interlocutory items, the

former are not in the Record. In the Assignment of Error on Final Judgment, it was pointed out that there is nothing in the Record to indicate that J. R. Klingaman is liable for any breach of contract or other acts or omissions of Banner. Fla. District Court affirmed all attacked Orders. Motion for Rehearing denied.

Raised in Fla. Supreme Court timely after denial of rehearing. Raised via Notice of Appeal and Petition for Certiorari Jurisdiction, which is by definition not part of the Record. Petitioners pointed out the basic illogicality thereof, which is in itself lack of due process of law. Denied.

Question 1.d. Raised in Motion for Rehearing in Fla. Circuit Court (R. 110-112) but said Motion was denied procedurally.

Raised in Fla. District Court timely after denial of Motion for Rehearing via Notice of Interlocutory Appeal and Accompanying Assignment of Error as well as Notice of Appeal (R. 2) and Assignment of Error (R. 3) for Final Judgment; because the latter are considered to be inclusive of all interlocutory items, the former are not in the Record. In the Assignment of Error on Final Judgment, it was pointed out that the

Fla. Circuit Court abused its discretion by the entry of the Order of February 14, 1977, which abuse is itself lack of due process of law. Affirmed. Rehearing denied.

Raised in Fla. Supreme Court timely after denial of rehearing. Raised via Notice of Appeal and Petition for Certiorari Jurisdiction, which is by definition not part of the Record. Petitioners pointed out the repeated lack of due process in that there was no notice on the new issues, no opportunity to be heard properly and admission of evidence not applicable to the pleadings and not even admissible thereunder. Denied.

Question 1.e. Not applicable for Fla. Circuit Court because it arose out of the very denial of Motion for Rehearing therein.

Raised in Fla. District Court timely after denial of Motion for Rehearing via Notice of Interlocutory Appeal and Accompanying Assignment of Error as well as Notice of Appeal (R. 2) and Assignment of Error (R. 3) for Final Judgment; because the latter are considered to be inclusive of all interlocutory items, the former are not in the Record. It was pointed out that the Fla. Circuit Court Clerk had effectively certified that said Motion was indeed time-

ly by the Fla. Circuit Court's standards. Affirmed. Rehearing denied.

Raised in Fla. Supreme Court timely after denial of rehearing. Raised via Notice of Appeal and Petition for Certiorari Jurisdiction, which is by definition not part of the Record. Petitioners pointed out that the Motion for Rehearing had indeed been timely filed by the Fla. Circuit Court's standards and that the critical act is service, not filing. Denied.

Question 2. Raised in Fla. Circuit Court by J. F. Stanley at the hearing on January 10, 1977, wherein he argued that a suit seeking removal of the boat properly belonged in Washington or wherever the boat is located. (R. 352, 393) Ignored.

Raised in Fla. District Court timely after denial of rehearing via Notice of Interlocutory Appeal and accompanying Assignment of Error as well as Notice of Appeal (R. 2) and Assignment of Error (R. 3) for Final Judgment; because the latter are considered to be inclusive of all interlocutory items, the former are not part of the Record. In the Assignment of Errors on the Final Judgment, it was pointed out that the Fla. Circuit Court erred in resuming juris-

diction after the Final Judgment of July 9, 1976. Affirmed. Rehearing denied.

Unable to raise question in Fla. Supreme Court because no Florida decision of which Petitioners are aware conflicts with that by the Fla. Circuit Court as affirmed by the Fla. District Court; such a conflict is a prerequisite to certiorari jurisdiction.

ARGUMENT RE DUE PROCESS OF LAW

General. The U.S. Constitution guarantees that no person shall be deprived of property by any State without due process of law. (U.S. Const., Amend. XIV) Likewise, the Florida Constitution guarantees that no person shall be deprived of property without due process of law. (Fla. Const., 1968, Art. I, Sec. 9) Nevertheless, the Florida Courts have here repeatedly, flagrantly and prejudicially failed to observe the requirements of due process of law in various Orders and in a Final Judgment for money against both Banner and J. R. Klingaman, thereby depriving Banner and J. R. Klingaman of property and placing Banner and J. R. Klingaman in jeopardy of losing many more valuable interests and exchangeable items which Banner and J. R. Klingaman possess outside of themselves.

For the purpose of the Constitutional guarantee, Florida defines "property" as "all valuable interests which a man may possess outside of himself," including "that which a person owns and the right to acquire, use and dispose of it." (6 Fla. Jur., Constitutional Law, Sec. 227)

The lack of due process here can be

placed into two categories:

1. Addition of J. R. Klingaman as a Plaintiff and subsequent Final Judgment for money against her, both with no due process of law whatever. Pertinent Orders and Judgment are:

a. May 28, 1976: J. R. Klingaman added as a Plaintiff in Fla. Circuit Court with absolutely no service of process or other notice whatever, without even a Motion to add her and with absolutely no hearing or anything else amounting to a day in Court.

b. February 14, 1977: J. R. Klingaman ordered by Fla. Circuit Court to pay "rent" and pro rata insurance premiums to M. L. Sommers although J. R. Klingaman is not, and never has been, a party to the Agreement and was not even found in this Order to be liable therefor.

c. April 12, 1977: Denial, without any explanation by Fla. Circuit Court, of J. R. Klingaman's Motion to Remove (Her) Name from Action.

d. April 25, 1977: Final Judgment for money entered in Fla. Circuit Court against J. R. Klingaman for alleged failure to return boat to Florida even though she is not

a party to the Agreement and even though she was carefully not ordered to so return the boat.

2. Entry of Final Judgment for money in Fla. Circuit Court against both Banner and J. R. Klingaman and two Orders leading thereto with no due process of law whatever. Said Orders and Judgment are:

a. February 14, 1977: Both Banner and J. R. Klingaman ordered by Fla. Circuit Court to pay "rent" and pro rata insurance premiums between "lease period(s)" to M. L. Sommers even though such payment was not even an issue raised in the applicable pleadings, which have never been amended to include it. Further, Banner ordered by Fla. Circuit Court to return the boat from Washington to Naples even though such return was not an issue raised in the applicable pleadings, which have never been amended to include it.

b. March 15, 1977: Order by Fla. Circuit Court denying Motion for Rehearing regarding Order of February 14 based solely on wrong contention that Motion for Rehearing had been untimely filed without any consideration whatever of the merits.

c. April 25, 1977: Final Judgment for

money entered in Fla. Circuit Court against both Banner and J. R. Klingaman without the Court's requiring proof of liability, proof of amount of damages or proof of any attempt to mitigate damages and without a hearing of any type whatever.

Glaringly absent from the addition of J. R. Klingaman as a Plaintiff in the Fla. Circuit Court and from entry of the Final Judgment for money in said Court against both Banner and J. R. Klingaman is the fundamental requisite of basic overall fairness in virtually every aformentioned Order and Judgment.

Detailed arguments follow for the two aforementioned categories.

Involvement of J. R. Klingaman. The Agreement executed March 9, 1975, was between only M. L. Sommers and Banner Sightseeing Company, which has always been a proprietorship owned solely by D. E. Klingaman. Not a party to said Agreement is J. R. Klingaman, who is not an owner or agent of Banner Sightseeing Company, which has never been a partnership or a corporation.

The original Complaint of Banner against M. L. Sommers was filed January 15, 1976,

in Fla. Circuit Court with the caption "Banner Sightseeing Company vs. Martin L. Sommers", indicating that the only Plaintiff was Banner. Said Complaint is not in the Record because an Amended Complaint was filed before trial.

On April 20, 1976, R. D. Sparkman took Banner's deposition (R. 8-35), wherein Banner confirmed that Banner Sightseeing Company is solely and completely owned by David E. Klingaman. (R. 31)

On May 7, 1976, M. L. Sommers filed a Motion for Judgment on the Pleadings, later denied, in which he complained in pertinent part: (R. 6)

1. "Plaintiff is apparently a d/b/a/..."
2. "Plaintiff has admitted that Banner Sightseeing Company is either a d/b/a or some other entity..."

Presumably in response to said Motion for Judgment on the Pleadings, J. F. Stanley, unbeknownst to Banner, filed a Motion to Amend, the entire body of which is:

"The Plaintiff moves for leave to amend the pleadings to show that the Plaintiff in the case is David E. Klingaman, trading as Banner Sightseeing Company." (R. 76)

On May 28, 1976, an Order was filed in Fla. Circuit Court which states in pertin-

ent part: (R. 90-91)

"1. The Plaintiff's Motion to Amend the Complaint to show that the proper party plaintiffs are David E. Klingaman and Joy R. Klingaman is granted."

"3. The Defendant's Motion for Judgment on the Pleadings is denied."

Unexplained in the Record or elsewhere in the Fla. Circuit Court is what happened between the Motion to Amend and the Order of May 28 to add J. R. Klingaman as a Plaintiff.

One of the essentials of due process of law is notice. (16 Am.Jur. 2d, Constitutional Law, Sec. 560; Anderson Nat. Bank v. Luckett, 321 U.S. 233; Voeller v. Neilston Warehouse Co., 311 U.S. 531; Snyder v. Massachusetts, 291 U.S. 97; Munch v. Davis, 196 So. 491, 143 Fla. 236; Coral Gables v. Certain Lands, 149 So. 36. 110 Fla. 189; McDaniel v. McElvy, 108 So 820, 91 Fla. 770) In the instant case, however, there was no notice whatever to either Banner or J. R. Klingaman of either the Motion to Amend or the Order of May 28; J. R. Klingaman learned of her being added as a Plaintiff only because Banner stumbled across it in conversations with J. F. Stanley but such extraofficial or casual notice is insuffic-

ient to operate as a substitute for notice required by due process of law. (16 Am.Jur. 2d, Constitutional Law, Sec. 562; Coe v. Armour Fertilizer Works, 237 U.S. 413)

Due process requires that notice must be reasonable and adequate for the purpose, due regard being had to the nature of the proceedings and the character of the rights which may be affected by it. (16 Am.Jur. 2d, Constitutional Law, Sec. 562; Dohany v. Rogers, 281 U.S. 362; Standard Oil Co. v. Missouri, 224 U.S. 270; Roller v. Holly, 176 U.S. 398; McDaniel v. McElvy, 108 So. 820, 91 Fla. 770) But in the instant case there was not any reasonable and adequate notice; there was simply no notice at all either before or after J. R. Klingaman's being added.

Notice must be given a sufficient length of time before the hearing to afford opportunity to be present. (16 Am.Jur. 2d, Constitutional Law, Sec. 564; Roller v. Holly, 176 U.S. 398; McDaniel v. McElvy, 108 So. 820, 91 Fla. 770) But in the instant case there was not any notice of such sufficient length; there was simply no notice at all of the Motion to Amend.

Another essential of due process is an

opportunity for a hearing. (16 Am.Jur. 2d, Constitutional Law, Sec. 569; Shields v. Utah Idaho C. R. Co., 305 U.S. 177; Powell v. Alabama, 287 U.S. 45; Blackmer v. United States, 284 U.S. 421; State ex rel. Munch v. Davis, 196 So. 491, 143 So. 236; Coral Gables v. Certain Lands, 149 So. 36, 110 Fla. 189; McDaniel v. McElvy, 108 So. 820, 91 Fla. 770) But in the instant case there was no hearing whatever on the Motion to Amend and there is nothing in the Record to refute this beyond the general reference in the first paragraph of the Order of May 28 to "oral argument of the parties and stipulations made in open Court" without pinpointing which of the four items ordered and adjudged therein had any kind of hearing "in open Court". In fact, said Order clearly specifies in the closing sentence that it was "done and ordered in Chambers", which is hardly "open Court".

The Florida Rules of Court permit addition of parties under three circumstances. (Fla.R.Civ.P. 1.250 (c)) Petitioners do not know which, if any, was used here, so will discuss all three, to wit:

1. Parties may be added as a matter of course within 20 days after service. But

the addition here was more than four months after service, so this circumstance was not applicable.

2. Parties may be added in amended pleadings if amendment is by leave of the Court or stipulation of the parties. There is nothing in the Record to show that the parties stipulated to amendment of the pleadings. There is nothing in the Record to show that the Amended Complaint was made by leave of the Court but, if it was, J. F. Stanley was not authorized whatever to state therein that he also represented J. R. Klingaman; neither Petitioner ever saw the Amended Complaint until February 26, 1977, more than nine months later! But the Florida Rule states that "parties may added in the amended pleading without further order of Court"; since there was, however, a further order of Court for adding J. R. Klingaman as a party, it can only be concluded that the Amended Complaint was not the method used.

3. A party may be added by order of the Court on its own initiative or on motion of any party at any stage of the action and on such terms as are just. But here there is nothing in the Record to show that the

Court added J. R. Klingaman on its own initiative. And there is no Motion in the Record of either party to add J. R. Klingaman as a Plaintiff, let alone the fact that there were no "just terms" and, in fact, no terms at all!

Therefore, the bottom line of J. R. Klingaman's being added is that there was no notice whatever either before or after the fact, that there was no hearing whatever and that the Court did not even require that its own Rules be followed. In particular, there was not the essential original notice whereby the Fla. Circuit Court might have acquired original jurisdiction.

On May 29, 1976, J. R. Klingaman voluntarily journeyed to Naples to give a witness deposition mainly because she had been present during negotiation of the Agreement and because she believed that J. F. Stanley could use said deposition to get the Record corrected as to her involvement because, as of then and until February 1977, Banner had been told that J. R. Klingaman was added as a party through some unspecified maneuver between R. D. Sparkman and the Court. However, R. D. Sparkman, who took said deposition, never offered it into evidence.

On June 28, 1976, Banner filed Answers to Interrogatories wherein Banner again confirmed that Banner Sightseeing Company was owned by only David E. Klingaman. (R. 92)

On June 30, 1976, the Fla. Circuit Court conducted a trial on Banner's Amended Complaint. (R. 149-325) In said trial, Banner once again confirmed that David E. Klingaman is the sole owner and proprietor as well as operator of Banner Sightseeing Company. (R. 153, 210)

On July 9, 1976, the Fla. Circuit Court awarded specific performance to Banner and, presumably for what it was worth, to J. R. Klingaman, who never gained any advantage whatever from such a judgment. (R. 98-100)

Meanwhile, from May to July 1976, J. F. Stanley was orally advising Banner that it would be inappropriate or somehow out of order for J. R. Klingaman to raise an objection or question to her being added as Plaintiff until the Fla. Circuit Court had passed an order affecting her. (R. 105) So, out of deference to Banner and not wishing to interfere with the legal proceedings, J. R. Klingaman did not speak up because there was then no such order, either pro or con.

The boat was finally delivered to Banner in Naples on August 14, 1976, and arrived in Washington on October 25, 1976, following an incredible 10-week voyage. Because of poor weather conditions and the necessity for numerous mechanical repairs, it was impossible to return the boat to Naples as scheduled. (R. 372-375)

On December 20, 1976, M. L. Sommers filed Amended Motion for Relief from Judgment and Claim for the Escrow Fund, wherein he proposed that the Fla. Circuit Court reverse the Final Judgment of July 9, 1976, and demanded that said Court release to him the $1,500 being held in escrow, all on the basis of alleged fraud by Banner. (R. 101-103) A hearing thereon was conducted in the Fla. Circuit Court on January 10, 1977. (R. 343-397) (The lack of due process in said hearing is discussed more fully in the next section; the lack of involvement of J. R. Klingaman in said hearing is discussed here.)

The Fla. Circuit Court did not rule on the Amended Motion and Claim at the hearing on January 10. Instead, said Court proceeded ahead with alleged jurisdiction over specific performance rather than turning around as demanded by M. L. Sommers. (R.

348-349, 351-352, 353-354, 392, 393) Said Court made the following ruling orally from the Bench:

> "From the evidence here that's been presented to this Court, the Court is going to order the boat to be returned. And in the time that he has it in his possession, that he will be responsible for lease payments of it.....So, the Court is going to order the boat returned. He is to pay the $1,500 or whatever it says in the contract, per month for the boat as long as it is up in Washington. In the event it is not --- or he can return it but he will be responsible to the amount, tune of the contract payments, per month, the amount that it is in his possession. The Court will enter the proration of the insurance, and Mr. Klingaman will be responsible for the sales tax." (Emphasis added.) (R. 395-396)

At no time in said ruling did the Fla. Circuit Court use any feminine title, any feminine pronoun, any plural pronoun or even J. R. Klingaman's name.

But on January 24, 1977, Banner received from R. D. Sparkman a copy of a proposed Order pursuant to the January 10 hearing in which J. R. Klingaman's name was spelled out in full no less than ten times in an effort to have J. R. Klingaman ordered

to do certain things some of which, even if they were possible and prudent, J. R. Klingaman had no proper legal status to attempt because she was not a party to the Agreement and did not file suit against M. L. Sommers. (R. 105)

Since it only then appeared that there was a proposed Order which would affect J. R. Klingaman, she promptly spoke up and specially submitted pro se to the Fla. Circuit Court the following documents in an effort to have her name removed from the case:

1. Filed February 3, 1977; J. R. Klingaman's letter of January 29, 1977, asking the Court to have her removed as a Plaintiff. (R. 104-106) The Court orally refused to respond.

2. Filed March 4, 1977: J. R. Klingaman's Motion to Remove Name from Action of February 23, 1977. (R. 113-117)

3. Filed March 28, 1977: J. R. Klingaman's Additional Argument and Authority in Support of Motion to Remove Name from Action of March 26, 1977. (R. 120-128) (This was filed pursuant to J. F. Stanley's interpretation of an oral Order of the Court on March 14, 1977, discussed below.)

4. Filed April 11, 1977: J. R. Klingaman's Reply and Rebuttal of April 4, 1977, to M. L. Sommers' Response to Motion to Remove Name from Action. (R. 134-146)

In each of said four documents, J. R. Klingaman repeatedly brought to the Court's attention the lack of due process connected with adding her to the case. (R. 104, 114, 115, 116, 121, 122, 140, 145)

Meanwhile, the Fla. Circuit Court issued an Order on February 14, 1977, pursuant to the Amended Motion and Claim and to the January 10 hearing. (R. 107-108) Said Order made the following pertinent findings of fact and conclusions of law:

1. The Court maintains jurisdiction over Banner (but not over J. R. Klingaman) to make such Orders and Judgment as are necessary to force Banner to comply with the contract.

2. Banner (but not J. R. Klingaman) is presently in breach of the contract.

3. The contract required Banner (but not J. R. Klingaman) to return the boat to Naples on November 6, 1976, and Banner (but not J. R. Klingaman) has failed to do so.

4. The contract (signed by only Banner and not by J. R. Klingaman) calls for a minimum payment of $1,500 per month.

5. Insurance premiums are prorated (per the Agreement signed by David E. Klingaman but not by J. R. Klingaman) in accordance with the lease period.

Nevertheless, said Order of February 14 ordered, adjudged and decreed as follows:

1. Only Banner "is required to return the motor vessel".

2. Only Banner "is required to pick up and return the vessel pursuant to the terms of the contract."

3. But both Banner and J. R. Klingaman "are ordered to immediately pay back rental.....and to hereafter timely pay the rent for the duration of the contract."

4. And both Banner and J. R. Klingaman "are immediately ordered to reimburse Defendant.....their share of the insurance.....Thereafter insurance prorations shall take place on a monthly basis."

In other words, the Fla. Circuit Court on January 10 ordered that only Banner was to pay "rent" and pro rata insuance premiums and even found and concluded on February 14 that only Banner is liable therefor. But all of this was suddenly transformed in the latter part of the February 14 document into an order for both Banner and J. R. Klingaman to pay the "rent" and pro rata insurance premiums.

The further irony is that J. R. Klingaman

was not ordered to "return the motor vessel" and was not even found to be liable therefor but was ordered to pay the "rent" and pro rata insurance premiums. Thus, J. R. Klingaman was held monetarily liable for not doing something which she was carefully not ordered to do and for which she was carefully not found liable. Further, J. R. Klingaman was held monetarily liable for not doing something which she had no contractual authority to do because she was never a party to the Agreement. If, to mitigate the "damages" or for any other reason, J. R. Klingaman had taken the boat with neither contractual nor Court authority in order to return it to Florida, she would most certainly have been guilty of grand larceny. So, the Fla. Circuit Court trapped her in a catch-22 situation of being subject to a money judgment if she did not return the boat but subject to a criminal charge if she did. This is so basic an illogicality that Banner and J. R. Klingaman are at a loss as to what to call it but it most certainly is not the "substantial justice" which the Fla. District Court claimed had been accomplished. (A. 2) It is shocking to the universal sense of justice

because it violates the primary requisite of fundamental fairness.

An Order for J. R. Klingaman to pay money was thus entered without her ever having received proper notice of alleged involvement in the case, without her having the opportunity for a hearing on her alleged involvement, without her receiving proper notice of a demand for her to pay money and without her having the opportunity for a hearing on whether she was liable to pay such money, all of which violate the fundamental requirements for proper notice and opportunity for hearing as discussed hereinbefore.

Said Order for J. R. Klingaman to pay money is void because, if jurisdiction is taken without service of process or notice, the proceeding is void, not just voidable. (Walden's Lessee v. Craig's Heirs, 39 U.S. 147) But the Fla. Circuit Court did not void said Order, thus again violating the essential of notice and the fundamental fairness required by due process of law.

Continuing with J. R. Klingaman's Motion to Remove Name from Action, the Fla. Circuit Court held a hearing on March 14,

1977, at which said Motion was one of the topics. (R. 326-336) This was the only hearing ever conducted by said Court on said Motion. No Court decision was made thereon at this hearing but the entire exchange thereon was:

> "R. D. SPARKMAN: This question of whether Joy R. Klingaman is in this case or not is extremely critical because if she's out this Court lets her out and she can volunteer or the Court lets her out.
>
> COURT: Does she have all the money or something?
>
> R. D. SPARKMAN: Well, we might as well pack it up and go home, we're finished. We can't touch it, we're finished. So this is extremely critical to us and I want a clear opportunity to be heard on that before she gets out.
>
> COURT: All right. Just go ahead and submit a letter within 15 days; formal brief or anything -- any case law or arguments you want to."

The Court's primary concern in the March 14 hearing with who has the money rather than with the merits violates the primary requisite of fundamental fairness. Due process requires that the proceeding be appropriate. (16 Am.Jur. 2d, Constitutional Law, Sec. 572) Due process also requires that the proceeding be fair. (Ibid.)

But it was certainly neither appropriate nor fair for the Court either to concern itself with who has the money or to neglect the merits, let alone both.

The Fla. Circuit Court never made any inquiry whatever at the March 14 hearing or on any other occasion as to whether J. F. Stanley was authorized to represent J. R. Klingaman although the fact that J. F. Stanley was never so authorized was pointed out in J. R. Klingaman's letter of January 29, 1977, (R. 104-106) and Motion to Remove Name from Action of March 4, 1977, (R. 110-112) both of which were already before the Court in J. R. Klingaman's effort to have her name removed as a party. Yet, upon being confronted with the conflict of J. R. Klingaman's repeated reports that J. F. Stanley was never authorized to act for her and J. F. Stanley's apparent appearance for her, the Court had the obligation, in the interest of the justice and fairness required by due process, to make such an inquiry, for an attorney appearing for a party must be authorized to make such appearance. (3 Fla.Jur., Appearance, Sec. 7)

If the Fla. Circuit Court believed that it had acquired jurisdiction over J. R.

Klingaman because J. F. Stanley represented himself as appearing for J. R. Klingaman when J. F. Stanley apparently agreed to the addition of J. R. Klingaman as a Plaintiff, concern for justice should have led the Court, at the very least, to inquire as to J. F. Stanley's authority, or lack thereof, to appear for J. R. Klingaman after J. R. Klingaman had, by the March 14 hearing, already brought to the Court's attention the fact that she was not represented at all! But the Court remained silent.

The Court would not be justified in using the general appearance rule to determine summarily the attorney-client relationship, at least where there is protestation that an appearance did not in fact reflect the true consensual relationship between the party and the party's attorney of record. (U.S. v. Seale, 461 F.2d 345) In the instant case, because J. R. Klingaman protested that J. F. Stanley's apparent appearance did not in fact reflect the true consensual relationship between J. R. Klingaman and J. F. Stanley, the Fla. Circuit Court was unjustified in summarily concluding that said appearance constituted a general appearance.

When J. R. Klingaman finally received on February 26, 1977, knowledge of how her name had been added as a Plaintiff, she promptly challenged, in her Additional Argument and Authority to have her name removed from the case (R. 120-128), J. F. Stanley's alleged authority to have presented himself as her attorney. If the Fla. Circuit Court had previously believed that J. F. Stanley had rightfully appeared for J. R. Klingaman, the Court should have considered said Additional Argument and Authority as also a motion to set aside J. F. Stanley's unauthorized appearance, which motion would have had to be granted because an appearance for a party entered without authorization should be set aside in a motion before judgment. (St. Lucie Estates v. Palm Beach Plumbing Supply Co., 133 So. 841, 101 Fla. 205)

Thus, J. R. Klingaman's only appearance before the Fla. Circuit Court was a special appearance pro se solely for the purpose of having her name removed from the case. A state may declare that a voluntary appearance in one of its courts, even for the purpose of objecting to jurisdiction, shall be deemed to be a general appearance. (16

Am.Jur. 2d, Constitutional Law, Sec. 568) However. Florida has no such law or rule. In fact, Florida permits a person to make a special appearance without submitting himself to the jurisdiction of the Court. (3 Fla.Jur., Appearance, Sec. 12) So long as such appearance is confined solely to jurisdictional matters and the party asks nothing of the court except that it determine whether or not it has jurisdiction under the law, the appearance must be regarded as limited in character and as per se conferring no jurisdiction on the court to proceed on the merits. (3 Fla.Jur., Appearance, Sec. 12)

Jurisdiction over a person should be disclosed by the Record, which should show that the person was served with process, that he formally entered his appearance in the proceedings or that, in person or by counsel, he was present and participated in the hearing or took some step or proceeding that amounted to a general appearance. (5 Am.Jur. 2d, Appearance, Sec. 12) Where an appearance is in issue, the question must be determined by the Record alone, not by other evidence, and any matters that take the place of process so as to show entry of

appearance must be part of the record.

In the instant case, the Record shows:

1. Absolutely no service of process whatever upon J. R. Klingaman and, in fact, there was none.

2. No formal entry of appearance whatever by J. R. Klingaman and only an unauthorized entry of appearance, only by means of adding her name to the Amended Complaint, by J. F. Stanley which was promptly and repeatedly refuted by J. R. Klingaman after learning in February 1977 that her name had been entered on the initiative of J. F. Stanley rather than R. D. Sparkman.

3. No presence whatever in person or otherwise in the Fla. Circuit Court by J. R. Klingaman, no presence whatever by any authorized counsel for J. R. Klingaman and no step or proceeding whatever that amounted to general appearance. In fact, J. R. Klingaman has never physically appeared in the Fla. Circuit Court, she has never authorized counsel to appear there for her (as previously discussed) and she has never taken any step whatever in the Fla. Circuit Court except a special appearance in an effort to have her name removed from the action.

Petitioners submit that the resulting lack of jurisdiction of the Fla. Circuit Court over J. R. Klingaman violates the basic essential of notice in due procee of law. Petitioners further submit that the failure of the Fla. Circuit Court to fully investigate whether J. F. Stanley was authorized to appear for J. R. Klingaman violates the fundamental requirements of fairness and justice in due process of law.

That the appearance of a party was entered without his authority has been deemed sufficient ground for its withdrawal or vacation. (St. Lucie Estates v. Palm Beach Plumbing Supply Co., 133 So. 841, 101 Fla. 205) Although application for withdrawal on this ground has been denied for failure to question an attorney's authority promptly (5 Am.Jur. 2d, Appearance, Sec. 37), such denial would not have been appropriate here because J. R. Klingaman promptly brought J. F. Stanley's alleged but unauthorized appearance to the attention of the Fla. Circuit Court. J. R. Klingaman did not know that J. F. Stanley had entered her appearance until she read J. F. Stanley's letter to Banner of February 23, 1977, which letter was received on February 26,

1977. By then, J. R. Klingaman had already filed her Motion to Remove Name from Action but she brought such lack of authorization to the Court's attention in the very next document which was filed with the Court, namely Additional Argument and Authority. (R. 120-128)

A main purpose in submitting said Additional Argument and Authority was to direct the Court's attention to J. R. Klingaman's objection to J. F. Stanley's entry of her appearance, knowledge of which was newly acquired since submitting said Motion.

Even if J. R. Klingaman's notifying the Court that J. F. Stanley was not authorized to enter her appearance was not as prompt as it might have been, the Court still had jurisdiction to act on it because judgment had not been entered.

On April 12, 1977, the Fla. Circuit Court entered an Order, without opinion or explanation, denying J. R. Klingaman's Motion to Remove Name from Action. (R. 147) On April 28, 1977, the Fla. Circuit Court entered, without opinion or explanation, a money judgment against both Banner and J. R. Klingaman. (R. 1) Due process requires that facts upon which judgment is

based be made known to the parties. (U.S. v. Wood, Wire and Metal Lathers International Union, Local No. 46, 471 F.2d 408) However, the Fla. Circuit Court here refused to remove J. R. Klingaman's name from the case but failed to explain why. Also, the Court held J. R. Klingaman liable in a money judgment for M. L. Sommers but failed to explain why. Thus, the Fla. Circuit Court violated the fundamental requisite of fairness of procedure in due process of law.

In overall summary regarding J. R. Klingaman's involvement in the instant case, Petitioners make the following points:

1. The essence of substantive due process is protection from arbitrary action. Substantive due process may be characterized as a standard of reasonableness. (16 Am.Jur. 2d, Constitutional Law, Sec. 550) As stated above, the Fla. Circuit Court acted arbitrarily here. The Court's readily taking J. R. Klingaman into its jurisdiction without bothering to tell her anything about it, the Court's refusing to consider the merits of her Motion to Remove Name from Action and the Court's ordering her to pay money after very carefully not find-

ing her liable therefor are beyond all standards of reasonableness. The Court thus violated one of the basic essentials of due process.

2. In each case, due process of law requires an evaluation based on a disinterested inquiry pursued in the spirit of science, on a balanced order of facts exactly and fairly stated, on the detached consideration of conflicting claims and on a judgment not ad hoc but duly mindful of reconciling the needs both of continuity and of change in any progressive society. (Rochin v. Calif., 342 U.S. 165) In the instant case, the only inquiry of Record made by the Fla. Circuit Court as to J. R. Klingaman's involvement was an inquiry as to who had all the money; Petitioners submit that this is hardly a disinterested inquiry pursued in the spirit of science. In the instant case, no order whatever by the Fla. Circuit Court gave any statement whatever regarding a finding of facts involving J. R. Klingaman but she was quickly added to the case and later ordered to pay money to M. L. Sommers without any explanation, let alone one that was exact and fair. In the instant case, there is nothing

whatever in the Record to show any consideration whatever of conflicting claims regarding J. R. Klingaman's involvement; there is just the Court's concern with who had all the money. In the instant case, Petitioners argue that the Order adding J. R. Klingaman to the case and the Order and Final Judgment for her to pay money to M. L. Sommers in no way respect the specific situations.

Other Lack of Due Process of Law Leading to Final Judgment. This section regards lack of due process of law, aside from the involvement of J. R. Klingaman, leading to the Final Judgment for money against Banner and J. R. Klingaman.

The Agreement between Banner and M. L. Sommers (R. 80-87) provides for the payment of money by the parties as delineated on pages 18-20 of this Petition.

There is no provision whatever in the Agreement for any payments by Banner to M. L. Sommers for any minimum fee or insurance premium or anything else between "lease period(s)", even if the boat is still in Banner's possession for any reason. Therefore, Petitioners submit that determination of any amounts payable by Banner to M. L.

Sommers for anything between "lease period(s)" must be based on the normal procedure for unliquidated damages, specifically that M. L. Sommers must prove liability by Banner, prove amount of damages and prove an attempt to mitigate damages. Not to be required to do so is a violation of the fundamental requisites of justice and fairness in due process of law. In the instant case, the Fla. Circuit Court made no requirement whatever for M. L. Sommers to put on such proofs before awarding a money judgment to him against Banner and J. R. Klingaman. (R. 1)

Following the Final Judgment of July 9, 1976, (R. 98-100) Banner deposited the $1,500 escrow in the Fla. Circuit Court Registry on August 13, 1976.

The breakdowns encountered on the ensuing voyage to Washington were caused by hidden defective mechanical parts (R. 373) of which M. L. Sommers had to be aware because he built the boat and had always owned and maintained it. In so delivering the boat, M. L. Sommers breached the Agreement by violating the requirement that the boat be delivered in good hull and mechanical condition. (R. 83)

The boat was due back in Florida on

November 6, only two weeks after it arrived in Washington. But it still needed mechanical repairs costing about $1,000 (R. 373) and it could not promptly and safely be returned to Florida because of poor weather and the fact that it did not meet Coast Guard requirements due to the mechanical defects. (R. 386) Also, experience had just shown that such a trip takes 10 weeks. Shortly thereafter, during the coldest winter on record, the boat became solidly frozen in for about four months.(R. 376, 388)

Meanwhile, M. L. Sommers moved on December 20, 1976, for: (R. 101-103)

1. Relief from the Final Judgment of July 9, 1976.

2. Release of the $1,500 escrow fund to him for alleged "back rent" for the time between "lease period(s)" even though said fund was being held for three other purposes but not for what he claimed or for anything else between seasons.

M. L. Sommers did not ask for the boat pursuant to the Agreement; instead, he wanted the Agreement discontinued with payment, at the same minimum rate, for whatever time Banner had the boat after the season.

On January 10, 1977, a hearing was held on M. L. Sommers' Motion/Claim. (R. 343-397) The Fla. Circuit Court did not rule on the Motion or Claim at said hearing but proceeded ahead as if the Court had full jurisdiction even though the boat was then far outside of Florida. The Court ordered Banner to return the boat from Washington to Florida and ordered Banner to pay M. L. Sommers "lease payments", pro rata insurance premiums and Florida sales tax for all the time that the boat was in Banner's possession.

The Court thus proceeded ahead with the Agreement instead of acting on M. L. Sommers' demand that the Final Judgment be withdrawn. That these are not the same is demonstrated by the fact that, in a written Order of February 14, 1977, (R. 107-108) the Court ordered Banner to continue to pick up and return the boat pursuant to the Agreement whereas M. L. Sommers just wanted the Agreement discontinued.

M. L. Sommers complained in his Motion about alleged misrepresentation by Banner at the trial and further so complained at the hearing. (R. 344-348) The Court agreed with Banner that evidence must be

restricted to occurrences before the trial. (R. 349) The Court even stated:

> "The Court entered a judgment that he (Banner) had a right to that boat under the contract. That's the only thing the Court said." (Emphasis added.) (R. 350)

But, upon R. D. Sparkman's discovering that he would not be allowed to introduce evidence about anything which happened after the trial, he complained and the Court suddenly reversed itself and resumed jurisdiction to order Banner to return the boat even though it was then far from Florida. (R. 352-353) Testimony and other evidence of occurrences after the trial were then admitted over Banner's repeated objections. (R. 348, 349, 379, 392) and despite Banner's arguing that M. L. Sommers had to sue in Washington for return of the boat just as Banner had to sue in Florida in the first place. (R. 351-352) For details of the Order of February 14, please see Appendix 7 of this Petition; the Court did not rule therein on the Amended Motion. On February 21, 1977, the Fla. Circuit Court entered an Order denying M. L. Sommers' claim for the escrow fund. (A. 8, R. 109)

So, R. D. Sparkman originally asked for

one thing but changed his mind at the hearing and got the Court to go along with him.

Again, notice is one of the essentials of due process of law. However, there was here no notice whatever to either Banner or J. R. Klingaman of any claim to proceed ahead with the Agreement; Banner and J. F. Stanley learned only at the hearing that the Court was doing a complete about-face from the pleadings. The Court's proceeding ahead despite J. F. Stanley's repeated objections is a violation of the basic requirement of fairness in due process of law.

Due process of law requires that notice must be reasonable and adequate for the purpose, due regard being had to the nature of the proceedings and the character of the rights which may be affected by it. But here there was not any reasonable and adequate notice; there was simply no notice at all until the Court started to charge in a completely different direction.

Even if due process of law would lead to the same result, a person is not precluded from complaining about the taking of his property without notice essential under the due process clause if he had no chance to present an adequate defense on the mer-

its. (Coe v. Armour Fertilizer Works, 237 U.S. 413) In the instant case, the Fla. Circuit Court provided no opportunity whatever for Banner and J. R. Klingaman to prepare any kind of defense whatever on the merits of the sudden new claim for money.

Petitioners submit that the notice required for the hearing of January 10, 1977, amounted to original notice because said hearing marked the beginning of placing Banner and J. R. Klingaman in the position of counterdefendants to a money claim. This is the precise notice essential to due process of law. (16 Am.Jur. 2d, Constitutional Law, Sec. 560)

But even if it is not considered necessary for original notice at this point, notice was necessary because M. L. Sommers' Motion/Claim constituted, at the very least, an amendment which materially enlarged or changed the action, which requires additional notice. (16 Am.Jur. 2d, Constitutional Law, Sec. 561)

As before, another essential of due process is an opportunity for a hearing, which must be fair (United Gas Pub. Serv. Co. v. Texas, 303 U.S. 123) But in the instant case, Petitioners submit that all concept

of fundamental fairness was violated when the Fla. Circuit Court changed direction completely in the middle of a hearing and, as if a specific pleading had not been made, asked R. D. Sparkman what he wanted, to which R. D. Sparkman poured out a list of demands not included in his pleadings. The incredible aspect is that the Court's inquiry to R. D. Sparkman appears on page 50 of the 55-page transcript; the Court did not completely ascertain what R. D. Sparkman wanted until after all of the evidence had been admitted!

The hearing must be an orderly proceeding in which the person to be affected has an opportunity to defend his rights. (16 Am.Jur. 2d, Constitutional Law, Sec. 572) In the instant case, however, the hearing was far from orderly because of the complete change of direction therein. And Banner had no fair opportunity to defend its rights because said change of direction was sprung upon Banner at the last minute.

Under due process of law, one is entitled to notice and opportunity to be heard, and the notice must correspond to the hearing and the relief must be appropriate to the notice and hearing. Even a Court of

original jurisdiction cannot enter a judgment beyond the claim asserted; it would not be due process of law. (Standard Oil Co. v. Missouri, 224 U.S. 270) In the instant case, the notice did not correspond to the hearing and the relief was not appropriate to the notice. The Fla. Circuit Court entered an Order beyond the claim asserted instead of backing up as M. L. Sommers first demanded. This amounted to flagrant violation of due process of law.

Being aggrieved by the Fla. Circuit Court's Orders of January 10 and February 14, 1977, Banner filed on February 24, 1977, a Motion for Rehearing on the Amended Motion for Relief from Judgment and Claim for the Escrow Fund. (R. 110-111) Briefly, said Motion for Rehearing complained that:

1. All testimony at the hearing on January 10 concerned events which happened after delivery of the boat to Banner rather than fraud or misrepresentation at the trial on June 30, 1976.

2. The Order of February 14 gave M. L. Sommers relief from breach of contract without his having asked for same in the first place.

3. Banner was not given a full opportun-

ity to raise the defense of impossibility of performance, including testimony about the condition of the boat when received and the extremely poor weather conditions.

A Motion for Rehearing shall be served not later than 10 days after entry of the Order. (Fla.R.Civ.P. 1.530(b)) In the instant case, said Motion for Rehearing was filed on February 24, 1977, within the 10-day limit. However, the Court Clerk did not date it RECEIVED until February 25. Said Clerk later corrected this error by certifying that said Motion for Rehearing had indeed been filed on February 24 (R. 112) but said certification was not made before a hearing on the Motion for Rehearing.

Meanwhile, however, service was made upon R. D. Sparkman although there was apparently no Certificate of Service. Nevertheless, R. D. Sparkman showed up at the relevant hearing on March 14, 1977, and did not object to service. Accordingly, Petitioners argue that R. D. Sparkman's actions and appearance constituted due notice or waiver thereof for, if a party actually appears in a proceeding, the notice becomes unimportant. (16 Am.Jur. 2d,

Constitutional Law, Sec. 568)

The Fla. Supreme Court has, at least twice, decided that filing of a post-trial motion need not necessarily be accomplished within the 10-day limit. Instead, only service is critical as to the 10-day limit; the requirement about filing is that it be done promptly after service if it was not done before or simultaneously. (Behm v. Div. of Admin., Dept. of Transp., 288 So.2d 476; Miami Transit v. Ford, 155 So.2d 360)

Nevertheless, the Fla. Circuit Court's entire concern at the March 14 hearing was whether the Motion for Rehearing had been timely filed. Said Court made only the following rulings at said hearing:

1. "All you have to do is file it." (Emphasis added.)
2. "You didn't file on time." (Emphasis added.)
3. "We'll deny the motion for rehearing on the grounds it wasn't filed within the time set forth in the rules." (Emphasis added.)

At said hearing, the question of timeliness of service was not considered and not even raised. Specifically, timeliness of service was not objected to by M. L. Sommers separately or relative to filing; M. L. Sommers therefore clearly consented to timely serv-

ice, which is the only criterion here, even if filing had not been accomplished until February 25.

On March 15, 1977, the Fla. Circuit Court entered a written Order (R.118-119) denying the Motion for Rehearing "for..... failure to timely file said Motion." (Emphasis added.)

Accordingly, the Fla. Circuit Court never allowed Banner the opportunity for a hearing on the merits of said Motion for Rehearing but such a hearing should have been allowed even if the Motion were filed on the 11th day. Petitioners submit that this amounts to prejudicial denial of the fundamental requirement for fairness and the basic requirement for an opportunity to be heard, particularly in view of the Fla. Supreme Court's specific rulings regarding service and filing.

Without any further notice or hearing whatever, the Fla. Circuit Court's Order for Banner and J. R. Klingaman to pay money to M. L. Sommers was apparently reduced to a Final Judgment on April 25, 1977. (R. 1)

Thus, Petitioners had a money judgment against them without ever having their day in Court. The Court's determination that

Petitioners should pay money came straight from the January 10 hearing and the February 14 Order, for which neither Banner nor J. R. Klingaman had any notice or any opportunity to be heard as discussed herinbefore.

Petitioners contend that M. L. Sommers put on no proof whatever of liability at the January 10 hearing. But even if he had proved liability, it is void because there was no notice and no opportunity to be heard afforded either Banner or J. R. Klingaman.

Then, even if Banner and J. R. Klingaman were still considered to be legally liable, M. L. Sommers should still have been required to prove the amount of damages in what was then a claim for alleged breach of contract for all intents and purposes, for a party is still entitled to his day in Court regarding the amount of damages even though he has been found liable for damages. (Championship Sports v. City of Miami Beach, 221 So.2d 24) In the instant case, the Court gave Petitioners no opportunity whatever to be heard on the amount of damages. Instead, the Court assumed that the minimum monthly fee of $1,500 should simply continue through the period between "lease period(s)". But

M. L. Sommers testified in his deposition that he seldom used the boat, even during the winter season. (R. 36-75) Thus, it could not be fairly concluded that the amount of damages was simply a continuation of the minimum fee called for in the operating season. The Court should have allowed Banner and J. R. Klingaman to be heard on the amount of damages.

The general principles of law relating to mitigation of damages apply to lease agreements. (Brewer v. Northgate of Orlando, Inc., 143 So.2d 358) If the Agreement here is a "lease agreement", as the Fla. Circuit Court seemed to think it is, M. L. Sommers had the obligation to demonstrate that he at least attempted to mitigate damages for his not having his boat back for the winter season but the Court made no requirement whatever for him to do so even though Banner was required to show that Banner attempted to mitigate damages at the trial on June 30, 1976. (R. 149-325)

Under the Agreement, M. L. Sommers could have come to Washington and gotten his boat as early as November 7, 1976, (R. 86) particularly since he claimed that the minimum

monthly fee should continue all through the winter if Banner had the boat. At the hearing on January 10, 1977, M. L. Sommers openly claimed that he could have piloted the boat back from Washington to Florida. (R. 368) For M. L. Sommers to have come and gotten the boat was one way for him to mitigate the claimed damages and these claims were before the Court. Yet the Court did not require M. L. Sommers to demonstrate that he attempted to mitigate the damages.

The hearing required before damages are assessed in proceedings for the taking of one's property is a matter of right. (16 Am.Jur. 2d, Constitutional Law, Sec. 569) But in the instant case, the Fla. Circuit Court took no step whatever to provide such a hearing. Petitioners argue that the Court therefore deprived Petitioners of due process of law.

Arbitrary action by the Court in the hearing of a cause or in its order violates due process. (16 Am.Jur. 2d, Constitutional Law, Sec. 575) Petitioners argue that the Fla. Circuit Court's actions here were arbitrary in that the Court afforded no opportunity whatever for a hearing on the alleged damages but, with no explanation

whatever, assumed and concluded that the minimum fee and pro rata insurance premium payments should continue through the winter even though the Agreement did not cover such a circumstance. Petitioners argue that the Court therefore deprived Petitioners of due process of law.

Due process of law guarantees an orderly procedure in Court for the ascertainment of damages. (16 Am.Jur. 2d, Constitutional Law, Sec. 578) The only procedure in Court here was a rushed hearing in which many vital and necessary steps, pointed out hereinbefore, were omitted, even a determination until almost the very end of exactly what M. L. Sommers wanted. Petitioners argue that this was nothing approaching orderliness and submit that the Fla. Circuit Court therefore deprived Petitioners of due process of law.

In overall summary and conclusions regarding other lack of due process of law leading to the Final Judgment for money for M. L. Sommers, Petitioners make the following points:

1. Neither Banner nor J. R. Klingaman was ever provided with the original notice essential to due process of law. (16 Am.Jur.

2d, Constitutional Law, Sec. 560)

2. There was not the fair and orderly administration of the laws insured by the due process clauses of the U.S. and Florida Constitutions. (16 Am.Jur. 2d, Constitutional Law, Sec. 544) Fair and orderly administration of the laws was particularly lacking in the hearings of January 10 and March 14, 1977, and their relevant written Orders.

3. Procedural due process requires that one whom it is sought to deprive of property must be given notice of the proceedings against him, he must be given an opportunity for a hearing and the problem of the deprivation, under the circumstances presented, must be resolved in a manner consistent with essential fairness. (16 Am.Jur. 2d, Constitutional Law, Sec. 548) In the instant case, neither Banner nor J. R. Klingaman was given these requirements appropriate to the hearing of January 10, 1977.

4. The essence of substantive due process is protection from arbitrary action. Substantive due process may be characterized as a standard of reasonableness. (16 Am.Jur. 2d, Constitutional Law, Sec. 550)

As stated above, the Fla. Circuit Court acted arbitrarily here. The Court's doing an about-face in the middle of a hearing, the Court's entering an Order and Judgment for Petitioners to pay money as if the Agreement provided the amount in some clause on liquidated damages and the Court's denying the Motion for Rehearing on the basis of filing without considering service are beyond all standards of reasonableness. The Court thus violated one of the basic essentials of due process.

5. In each case, due process of law requires an evaluation based on a disinterested inquiry pursued in the spirit of science, on a balanced order of facts exactly and fairly stated, on the detached consideration of conflicting claims and on a judgment not ad hoc but duly mindful of reconciling the needs both of continuity and of change in any progressive society. In the instant case, the Fla. Circuit Court made no inquiry whatever into the alleged damages correctly applicable to Banner's alleged breach of the Agreement; Petitioners submit that this is hardly a disinterested inquiry pursued in the spirit of science. In the instant case, Petitioners

argue that the Order and Judgment for Banner and J. R. Klingaman to pay money to M. L. Sommers and that the denial of the Motion for Rehearing on the basis of alleged late filing in no way respect the specific situations.

ARGUMENT RE JURISDICTION OVER OUT-OF-STATE PERSONAL PROPERTY

On May 19, 1976, Banner filed in the Fla. Circuit Court an Amended Complaint wherein Banner demanded specific performance of the Agreement by M. L. Sommers. (R. 77-89) Specifically, Banner sought an Order for M. L. Sommers to deliver the boat to Banner so that Banner could take said boat to Washington in order to operate sightseeing boat tours pursuant to the Agreement. Said Amended Complaint, being a complaint of Banner about M. L. Sommers, did not go to return of the boat from Washington to Florida. Expressly, the Amended Complaint prayed "for a decree that Defendant specifically perform said contract." (R. 78)

On July 9, 1976, the Fla. Circuit Court entered a Final Judgment granting and Ordering such specific performance. (R. 98-100) As in the Amended Complaint, said Final Judgment did not address itself to return of the boat from Washington to Florida; to so address itself, the Final Judgment would have gone beyond the decree sought in the Amended Complaint. But the Fla. Circuit Court took no such additional

jurisdiction beyond that requested. Specifically, the Court took no jurisdiction as to what might happen after the boat was delivered to Banner and left Florida.

On December 20, 1976, M. L. Sommers filed an Amended Motion for Relief from Judgment and a Claim for the Escrow Fund (R. 101-103) seeking only:

1. Relief from Final Judgment of July 9, 1976.

2. Release of the $1,500 escrow fund to M. L. Sommers for alleged "back due rent" for the period between "lease period(s)" even though said fund was being held for three other purposes but not for anything whatever between seasons.

M. L. Sommers did not ask that the boat, still in Washington, be returned to Florida pursuant to continuation of the Agreement; instead, he just wanted the whole Agreement discontinued with payment for whatever time Banner had the boat after the season even though the Agreement did not go to such payment.

On January 10, 1977, a hearing was held on said Amended Motion/Claim. (R. 343-397) The Fla. Circuit Court failed at said hearing to rule on said Motion/Claim. Instead,

the Court proceeded ahead at said hearing as if the Court had full jurisdiction even though the boat was then outside of Florida. The Court ordered Banner to return the boat from Washington to Florida and ordered Banner to pay certain money to M. L. Sommers. (R. 395-396)

A written Order pursuant to said hearing was entered on February 14, 1977. (A. 7)

At the time of said hearing of January 10 and Order of February 14, the boat was tied up and actually frozen in solid at the Fort Washington Marina, Oxon Hill, Maryland. Said marina is a commercially operated concession on a Federally owned enclave.

So, the Fla. Circuit Court ordered a nonresident to remove personal property from a location far outside of the Court's geographic jurisdiction.

But when Banner brought the original Complaint against M. L. Sommers, Banner had to do so in Florida because the boat was located in Florida. Even though the Agreement was executed in the District of Columbia (D.C.), the D.C. Courts would have had no jurisdiction to order the boat removed from Florida, thus making necessary

a suit in Florida.

Petitioners argue that evenhanded justice dictates that the Fla. Circuit Court had no jurisdiction to order a nonresident to remove a boat (or any other item of personal property) from its location in D.C., Maryland or any other geographic location outside the boundaries of Florida.

Thus, the question is:

> Does a State Court have the authority and/or jurisdiction to order a nonresident of said State to remove an item of personal property from its location in another State or from a Federal enclave entirely within the boundaries of another State?

Petitioners argue that a State Court has no such authority or jurisdiction and that the February 14 Order of the Fla. Circuit Court is therefore invalid; Petitioners argue that M. L. Sommers had to have an Order of a Maryland Court or Federal Court for Banner, let alone J. R. Klingaman, to be monetarily liable for failure to so remove the boat.

However, Petitioners have been unable to locate any precedent on point and, on the basis that this question has not heretofore been squarely decided by the U.S. Supreme Court, respectfully request that the U.S.

Supreme Court approach it in the light of fundamental facts and primary principles rather than upon mere precedent. In other words, Petitioners submit that a State Court has decided a Federal question of substance not heretofore determined by the U.S. Supreme Court and Petitioners therefore seek certiorari jurisdiction pursuant thereto. (U.S. Supreme Court Rule 19)

CONCLUSION

The Florida Courts have repeatedly, flagrantly and prejudicially denied due process of law to both Banner and J. R. Klingaman.

Also, the Florida Courts have decided a Federal question of substance apparently not previously determined by the U.S. Supreme Court.

Accordingly, Petitioners respectfully petition the U.S. Supreme Court to issue a Writ of Certiorari to both the Fla. Supreme Court and the Fla. District Court.

Respectfully submitted,
David E. Klingaman, trading as
Banner Sightseeing Company, and
Joy R. Klingaman

APPENDIX 1: ORDER OF FLORIDA SUPREME COURT DENYING PETITION FOR WRIT OF CERTIORARI

SUPREME COURT OF FLORIDA

July 26, 1978

David E. Klingaman, etc., et al. Petitioners vs. Martin L. Sommers Respondent	Case Number 53,823

This cause having heretofore been submitted to the Court on jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Fla.R.App.P. 9.120, and it appearing to the Court that it is without jurisdiction, it is ordered that certiorari is denied.

No Motion for Rehearing will be entertained by the Court. See Fla.R.App.P. 9.330(d).

Adkins, Acting C.J., Boyd, Overton, Hatchett and Alderman, JJ., concur.

APPENDIX 2: ORDER OF FLORIDA DISTRICT COURT AFFIRMING ALL CIRCUIT COURT ORDERS

IN THE DISTRICT COURT OF APPEAL OF FLORIDA, SECOND DISTRICT

David E. Klingaman, trading as Banner Sightseeing Company, and Joy R. Klingaman Appellants vs. Martin L. Sommers Appellee	Cases Numbers 77-477 And 77-896 Consolidated

Opinion filed January 20, 1978.

PER CURIAM.

From a careful review of the record in this case, we are convinced that the appellants had their day in court, and that substantial justice has been accomplished. Therefore, we affirm the several orders and the final judgment which are attacked herein. However, in view of the peculiar posture of this case, and the fact that the appellee has now been able to obtain the return of his boat, we hereby relieve the appellant, David E. Klingaman, from further penalty for contempt.

Grimes, A.C.J., and Ryder and Danahy, JJ., concur.

APPENDIX 3: ORDER OF FLORIDA DISTRICT COURT DENYING PETITION FOR REHEARING

DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA IN AND FOR THE SECOND DISTRICT

March 6, 1978

David E. Klingaman, trading as Banner Sightseeing Company, and Joy R. Klingaman Appellants vs. Martin L. Sommers Appellee	Cases Numbers 77-477 And 77-896

Counsel for appellants having filed in this cause a Petition for Rehearing and the same having been considered by the Court, it is

Ordered that said Petition be and the same is hereby denied.

(No judges identified.)

APPENDIX 4: FINAL JUDGMENT OF FLA. CIRCUIT COURT AGAINST BANNER AND J. R. KLINGAMAN

CIRCUIT COURT OF THE 20TH JUDICIAL CIRCUIT
IN AND FOR COLLIER COUNTY, FLORIDA

David E. Klingaman, t.a. Banner Sightseeing Company, and Joy R. Klingaman Plaintiffs vs. Martin L. Sommers Defendant	Case Number 76-0045-CA-01-CTC

FINAL JUDGMENT

It is adjudged that Defendant, Martin L. Sommers, recover from the Plaintiffs, David E. Klingaman and Joy R. Klingaman, the sum of $11,566.67 for which let execution issue.

Done and ordered at Naples, Collier County, Florida on this 25th day of April, 1977.

/s/ Charles T. Carlton, Circuit Judge

Ordered April 25, 1977.
Filed April 28, 1977.
Recorded April 28, 1977.

APPENDIX 5: ORDER OF FLORIDA CIRCUIT COURT ADDING J. R. KLINGAMAN AS A PLAINTIFF

CIRCUIT COURT OF THE 20TH JUDICIAL CIRCUIT
IN AND FOR COLLIER COUNTY, FLORIDA

David E. Klingaman, t.a. Banner Sightseeing Company, and Joy R. Klingaman Plaintiffs vs. Martin L. Sommers Defendant	Case Number 76-0045-CA-01-CTC

ORDER

This cause having come on to be heard on the 17th day of May, 1976, and the Court having considered the various Motions filed by the Plaintiff and the Defendant, and having heard oral argument of the parties and stipulations made in open Court, it is therefore

Ordered and Adjudged as follows:

1. The Plaintiff's Motion to Amend the Complaint to show that the proper party plaintiffs are David E. Klingaman and Joy R. Klingaman is granted.

2. The Plaintiff's Motion to Strike the Defendant's Affirmative Defenses is denied.

APPENDIX 5 (continued)

3. The Defendant's Motion for Judgment on the Pleadings is denied.

4. The Plaintiffs are directed to disclose the ownership and the assets of Banner Sightseeing Company and the request insofar is David E. Klingaman is concerned shall be in the form of an interrogatory insomuch as his deposition has been previously taken.

Done and Ordered in Chambers in East Naples, Collier County, Florida, on this 27th day of May, 1976.

/s/ Charles T. Carlton, Circuit Judge

Ordered May 27, 1976.
Filed May 28, 1976.
Recorded May 28, 1976.

APPENDIX 6: FINAL JUDGMENT OF FLA. CIRCUIT COURT AWARDING SPECIFIC PERFORMANCE TO BANNER

CIRCUIT COURT OF THE 20TH JUDICIAL CIRCUIT
IN AND FOR COLLIER COUNTY, FLORIDA

David E. Klingaman, t.a. Banner Sightseeing Company, and Joy R. Klingaman Plaintiffs vs. Martin L. Sommers Defendant	Case Number 76-0045-CA-01-CTC

FINAL JUDGMENT

This cause came on regularly for non-jury trial, on June 30, 1976, between Plaintiffs, David E. Klingaman, trading as Banner Sightseeing Company, and Joy R. Klingaman, and the Defendant, Martin L. Sommers. The Court, having considered the testimony and having examined the evidence offered by the respective parties and being fully advised in the premises, makes the following findings of fact and conclusions of law:

1. The Lease Agreement, dated March 9, 1975, between Defendant, Martin L. Sommers

and Plaintiff, Banner Sightseeing is a valid, binding and enforceable contract.

2. The Contract was not entered into as a result of any trickery, deception or over-reaching on the part of the Plaintiffs.

3. The Contract of March 9, 1975, is fair and equitable and was an arms-length transaction.

4. The Plaintiffs obtained the permits called for in the contract to operate the boat owned by the Defendant.

5. The Plaintiffs were at all times ready, willing and able to perform all the provisions of the contract on their part and had in fact performed all acts called for in the contract on their part prior to Defendant's failure to turn the boat over to them.

6. The boat the "Erik" to be leased by the Plaintiffs has a peculiar character and value and was unique and is thus the object of an action for specific performance.

7. An action for damages would not be an adequate remedy.

8. The Defendant, Martin L. Sommers, had no adequate reason for not complying with the lease agreement.

9. That the Plaintiffs properly elected to renew the contract for the year 1976, by sending appropriate notice to the Defendant, Martin L. Sommers, together with the $750.00 called for in the agreement prior to January 15, 1976.

Now, therefore, by reason of said law and findings it is

Ordered, adjudged and decreed:

1. That specific performance of the contract set forth in the Complaint be and the same is hereby granted.

2. That the Defendant, Martin L. Sommers, shall deliver the passenger vessel named Erik, U.S. Coast Guard Official Number 527551, to the Plaintiffs within ten days (10 days) of the date of this Order and shall do everything called for in the contract to have the boat ready for the Plaintiffs within said ten-day period.

3. That upon delivery of the boat the Plaintiffs shall pay to the Defendant the

sum of $2,250.00 as called for in the contract and in addition, shall place the $1,500 in escrow as called for in paragraph 22 of the contract.

4. The Clerk of the Circuit Court of Collier County, Florida, is directed to release the $750.00 placed in the registry of the Court by the Defendant, Martin L. Sommers, to Martin L. Sommers upon his compliance with this Order.

5. The Defendant, Martin L. Sommers, is restrained from disposing of said passenger vehicle named Erik, U.S. Coast Guard Official Number 527551, as long as the contract is in force.

6. That Plaintiffs recover their costs for this action from the Defendant, Martin L. Sommers, to be set at a subsequent hearing.

Done and ordered in Chambers in the Collier County Courthouse, Naples, Florida, this 9th day of July, 1976.

/s/ Charles T. Carlton, Circuit Judge

Ordered July 9, 1976.
Filed July 12, 1976.
Recorded July 13, 1976.

APPENDIX 7: ORDER OF FLORIDA CIRCUIT COURT ON M. L. SOMMERS' MOTION FOR RELIEF FROM JUDGMENT

CIRCUIT COURT OF THE 20TH JUDICIAL CIRCUIT
IN AND FOR COLLIER COUNTY, FLORIDA

David E. Klingaman, t.a. Banner Sightseeing Company, and Joy R. Klingaman Plaintiffs vs. Martin L. Sommers Defendant	Case Number 76-0045-CA-01-CTC

ORDER

This cause came on Defendant's Motion for Relief from Judgment with John F. Stanley, Esquire, appearing as the attorney for the Plaintiffs and Richard D. Sparkman, Esquire, appearing as the attorney for the Defendant. The Court having heard the testimony, having examined the evidence offered by the respective parties, makes the following findings of fact and conclusions at law:

1. That the Court has and maintains jurisdiction of the parties and the subject matter.

2. That the Court maintains jurisdiction over the Defendant, Martin L. Sommers, to force compliance with the contract and to make such other Orders or Judgments as are necessary. Likewise the Court maintains jurisdiction over the Plaintiff, David E. Klingaman, trading as Banner Sightseeing Company, to make such Orders and Judgments as are necessary to force David E. Klingaman, trading as Banner Sightseeing Company to comply with the contract.

3. That the Defendant, Martin L. Sommers, is in compliance with the contract and that the Plaintiff, David E. Klingaman, trading as Banner Sightseeing Company, is presently in breach of the contract.

4. That the contract required the Plaintiff, David E. Klingaman, trading as Banner Sightseeing Company, to return the boat to Naples, Florida, on November 6, 1976, and that the Plaintiff, David E. Klingaman, trading as Banner Sightseeing Company, has failed to do so.

5. That the contract calls for minimum

rental of $1,500.00 monthly.

6. That insurance premiums are prorated between the Lessor and Lessee in accordance with the lease period or the number of days that a given party has the vessel.

7. That the Defendant, Martin L. Sommers, has paid the annual insurance based upon the vessel being returned on November 6, 1976.

Now, therefore, by reason of said law and findings, it is

Ordered, adjudged and decreed:

1. That the Court hereby continues jurisdiction of the parties and of the subject matter of the suit to the final determination of the period of the contract.

2. That the Plaintiff, David E. Klingaman, trading as Banner Sightseeing Company, is required to return the motor vessel, "Erik" (Banner Eagle) to Defendant, Martin L. Sommers.

3. That henceforth Plaintiff, David E. Klingaman, trading as Banner Sightseeing Company, is required to pick up and return the vessel pursuant to the terms of the contract and is specifically required to

comply with the terms of the contract.

4. That Plaintiffs, David E. Klingaman, trading as Banner Sightseeing Company, and Joy R. Klingaman, are ordered to immediately pay back rental on the vessel based at a minimum of $1,500.00 monthly which was due since November 6, 1976, and to hereafter timely pay the rent for the duration of the contract.

5. That Plaintiffs, David E. Klingaman, trading as Banner Sightseeing Company, and Joy R. Klingaman, are immediately ordered to reimburse Defendant, Martin L. Sommers, their share of the insurance from November 6, 1976 to the date of this Order. Thereafter insurance prorations shall take place on a monthly basis.

Done and Ordered in East Naples, Collier County, Florida, on this 14th day of February, 1977.

/s/ Charles T. Carlton, Circuit Judge

Ordered February 14, 1977.
Filed February 14, 1977.
Recording date not specified.

APPENDIX 8: ORDER OF FLORIDA CIRCUIT COURT DENYING MOTION TO RELEASE ESCROW FUND

CIRCUIT COURT OF THE 20TH JUDICIAL CIRCUIT
IN AND FOR COLLIER COUNTY, FLORIDA

David E. Klingaman, t.a. Banner Sightseeing Company, and Joy R. Klingaman Plaintiffs vs. Martin L. Sommers Defendant	Case Number 76-0045-CA-01-CTC

ORDER

This cause came upon Defendant's Motion to Reduce Indebtedness to Judgment and Motion to Release Deposit and the Court hearing same and being advised in it premises, it is

Ordered:

1. That Defendant's Motion to Release Deposit is hereby denied.

2. That Plaintiff is given fifteen (15) days from the date of this Order to comply with the Order of February 14, 1977, and pay the amounts due or the Court will reduce the outstanding indebtedness at that date to a final judgment.

3. That the attorneys are hereby ordered to compromise as to the question of inspection and if the attorneys are unable to compromise, the Court will appoint an inspector and assess costs appropriately.

Done and Ordered at Collier County Courthouse, Naples, Florida, on this 21st day of February, 1977.

/s/ Charles T. Carlton, Circuit Judge

Ordered February 21, 1977.
Filed February 21, 1977.
Recorded February 21, 1977.

APPENDIX 9: ORDER OF FLORIDA CIRCUIT COURT DENYING BANNER'S MOTION FOR REHEARING

CIRCUIT COURT OF THE 20TH JUDICIAL CIRCUIT
IN AND FOR COLLIER COUNTY, FLORIDA

David E. Klingaman, t.a. Banner Sightseeing Company, and Joy R. Klingaman Plaintiffs vs. Martin L. Sommers Defendant	Case Number 76-0045-CA-01-CTC

ORDER

This cause coming on for hearing on Plaintiff's Motion for Rehearing, Plaintiff's Motion to Withdraw and Defendant's Motion for Contempt and the Court hearing same and being advised in its premises, it is

Ordered:

1. That Plaintiff's Motion for Rehearing is hereby denied for Plaintiff's failure to timely file said Motion.

2. That Plaintiff's Motion to Withdraw is hereby granted, counsel may therefore withdraw and Plaintiff is hereby granted fifteen (15) days to secure alternative

counsel.

3. The Court finds the Plaintiff, David E. Klingaman, in contempt for failure to obey the Court Order of February 14, 1977, and return the motor vessel "Erik" (Banner Eagle). The Court hereby sentences the Plaintiff, David E. Klingaman, to serve one (1) year in the Collier County Jail.

4. The Plaintiff, David E. Klingaman, may purge himself of this contempt by returning the motor vessel to Naples pursuant to the contract. Said motor vessel must be underway and out of Washington, D.C., within fifteen (15) days from the date hereof.

Done and ordered at East Naples, Collier County, Florida, on this 15th day of March, 1977.

/s/ Charles T. Carlton, Circuit Judge

Ordered March 15, 1977.
Filed March 15, 1977.
Recorded March 15, 1977.

APPENDIX 10: ORDER OF FLORIDA CIRCUIT COURT DENYING MOTION TO REMOVE J. R. KLINGAMAN'S NAME FROM ACTION

CIRCUIT COURT OF THE 20TH JUDICIAL CIRCUIT
IN AND FOR COLLIER COUNTY, FLORIDA

David E. Klingaman, t.a. Banner Sightseeing Company, and Joy R. Klingaman Plaintiffs vs. Martin L. Sommers Defendant	Case Number 76-0045-CA-01-CTC

ORDER

This cause came on to be heard on Plaintiff's Motion to Remove Name from Action and the Court having taken into consideration arguments by all parties in this action, it is

Ordered:

1. That Plaintiff's Motion to Remove Name from Action is hereby denied.

Done and ordered in East Naples, Collier County, Florida on this 12th day of April, 1977.

/s/ Charles T. Carlton, Circuit Judge

Ordered, filed and recorded April 12, 1977.

CERTIFICATE OF SERVICE

This is to certify that three copies of this Petition have been furnished to Respondent's attorney, Richard D. Sparkman, Sparkman and Hamilton, 2432 Davis Boulevard, Naples, Florida 33941 by first class mail, postage prepaid, this 23rd day of December 1978.

David E. Klingaman, trading as
Banner Sightseeing Company
Petitioner

Supreme Court, U.S.
FILED
FEB 22 1979
MICHAEL RODAK, JR., CLERK

SUPREME COURT OF THE UNITED STATES

Case No. 78-1026

DAVID E. KLINGAMAN, trading as
BANNER SIGHTSEEING COMPANY, and
JOY R. KLINGAMAN,

Petitioners,

vs

MARTIN L. SOMMERS,

Respondent

MOTION TO DISMISS

1. BASIS FOR DISMISSAL
2. GENERAL STATEMENT OF THE CASE
3. ARGUMENT

MARTIN L. SOMMERS
Pro Se
1380 Barbizon Lane
Naples, FL 33942
Tel. No. 813 774-1054

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MOTION TO DISMISS

Respondent pursuant to Rule 16 moves to dismiss and would show as follows:

BASIS FOR DISMISSAL

That the grounds upon which Petitioners move the Court for jurisdiction does not present a substantial federal question and the Judgment to be reviewed rests on adequate non-federal basis.

GENERAL STAEMENT OF THE CASE

The Petitioners' General Statement of the Case is chronologically correct but editorally is a set of gross misrepresentations. The simple fact is that Petitioners sued Respondent under a fictitious name for specific performance. Pursuant to a Motion to Dismiss Petitioners amended their pleading to add the true owners of the company in accordance with the discovery.

Petitioners won the case and Respondent was ordered to specifically perform the contract. Respondent then performed his part of the contract. Pursuant to a Motion for Rehearing, the Court stated that it had retained jurisdiction to enforce the performance of the total contract.

Petitioners then failed to perform by removing the boat from the jurisdiction and refusing to return it.

Petitioners were simply ordered to return the boat and were found in contempt when they failed to do so. The Court then assessed money damages against Petitioners pursuant to the contract for their failure to pay the agreed upon rent.

ARGUMENT

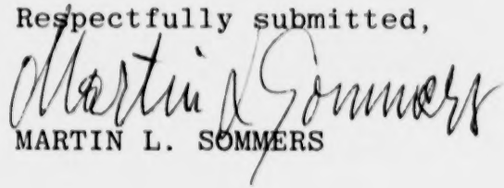
Petitioners came under the jurisdiction of the Florida Courts by filing a lawsuit in Florida based on a Florida contract and there is no substantial federal question involved. The Petitioners picked their forum and filed the lawsuit. Respondent did not pick a forum nor did Respondent desire the lawsuit. The Judgment rests on simple contract law of the State of Florida. With reference to due process of law, the only person served was the Defendant, who is the Respondent here. There is no known provision of the law where it is necessary to serve a Plaintiff with original process nor is the Respondent, who is Defendant below, under an obligation to inquire if the Petitioner, Joy R. Klingaman, who was the Plaintiff below, actually knows that she is a Party-Plaintiff.

The argument with reference to out of state personal property is a sham. The property is and always was personal property properly licensed in the State of Florida and leased on a temporary basis to be taken to another jurisdiction.

The Court obtained jurisdiction pursuant to Petitioners lawsuit and never lost jurisdiction over either the property or the persons.

WHEREFORE, Respondent prays the Court to dismiss the appeal as no substantial federal question has been answered and the matter has been completely disposed of on non-federal grounds in the Court of the State of Florida.

Respectfully submitted,



MARTIN L. SOMMERS

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three copies of the foregoing has been furnished to David E. Klingaman, trading as Banner Sightseeing Company and Joy R. Klingaman, 11700 Charles Road, Silver Spring, Maryland 20906 by U.S. Mail on this 20 day of February, 1979.

MARTIN L. SOMMERS
Pro Se
1380 Barbizon Lane
Naples, FL 33942
Tel. No. (813) 774-1054

Supreme Court, U. S.
FILED
MAR 10 1979
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1978

Number 78-1026

David E. Klingaman, trading as
Banner Sightseeing Company, and
Joy R. Klingaman

Petitioners

vs.

Martin L. Sommers

Respondent

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

David E. Klingaman, trading as
Banner Sightseeing Company, and
Joy R. Klingaman
Petitioners Pro Se
11700 Charles Road
Silver Spring, Maryland 20906
Telephone: 202-942-1976

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GENERAL COMMENTS ON BRIEF IN OPPOSITION

1. Banner has been advised by the U.S. Supreme Court Clerk that M. L. Sommers' Motion to Dismiss will be considered as a Brief in Opposition.

2. M. L. Sommers was granted an extension of time for filing said Brief because he declared his inability to write it himself and because he wanted R. D. Sparkman to write and file it after being admitted to the Bar of the U.S. Supreme Court. R. D. Sparkman was admitted but M. L. Sommers nevertheless thereafter filed pro se.

3. Said Brief was not timely filed.

4. Nowhere therein does M. L. Sommers refer to the Record to support his various allegations.

5. Nowhere therein does M. L. Sommers cite any constitutional provisions, statutes, cases or authorities to support his various contentions.

STATEMENT OF THE CASE

Absolutely untrue is M. L. Sommers' assertion that Petitioners' General Statement of the Case "editorially is a set of gross misrepresentations." He specifies none.

To the contrary, the Record completely supports Petitioners' General and Chronological Statements of the Case and shows that M. L. Sommers misstates several case occurrences, to wit:

1. M. L. Sommers wrongly asserts that both Banner and J. R. Klingaman sued him. In fact, only Banner sued him. (R. 6, 8, 35a, 76) J. R. Klingaman was not specified as a Plaintiff until the Amended Complaint (R. 77-79) was filed, and then completely unbeknownst to either Banner or J. R. Klingaman. In the Amended Complaint, only Banner (not J. R. Klingaman) prays for relief. For more facts and argument, please see Petition 13-14, 21-22, 34 and 36-43.

2. M. L. Sommers mentions some Motion to Dismiss but there is none in the Record.

3. M. L. Sommers' only basis for pressing his money claim against J. R. Klingaman is his allegation that some discovery shows that J. R. Klingaman is an owner of Banner Sightseeing Company. There is no such dis-

covery. The Record repeatedly and undisputedly shows that Banner Sightseeing Company is solely owned by David E. Klingaman, to wit:

a. Deposition. (R. 31)
b. Interrogatories. (R. 92)
c. Trial. (R. 153, 210)

The amended caption has always specified that J. R. Klingaman does not trade as Banner Sightseeing Company. (R. 1, 77, 90, 92, 98, 101, 107, 109, 149, 343, etc.) For more facts and argument, please see Petition 13, 21-22, 37 and 43.

4. M. L. Sommers wrongly asserts that the Fla. Circuit Court's stating that it retained jurisdiction (R. 107-108, 352-353, 395-396) flowed from the Motion for Rehearing. (R. 110-112) It was vice versa.

5. M. L. Sommers wrongly asserts that Petitioners removed the boat from Florida after the Fla. Circuit Court stated in January and February 1977 that it retained jurisdiction. (R. 352-353, 395-396, 107-108) In fact, removal by only Banner (not J. R. Klingaman) occurred five months before, in August 1976, (R. 357, 372) pursuant to the Fla. Circuit Court's Final Judgment of July 9, 1976. (R. 98-100) It was impossible for

Banner to timely return the boat in November 1976 or soon thereafter because of ice, bad weather and necessary repairs. (R. 372-376, 382-388) There was no refusal whatever. For more facts and argument, please see Petition 13-15, 22-23, 44-45 and 47-48.

6. M. L. Sommers wrongly asserts that both Petitioners were "ordered to return the boat and were found in contempt when they failed to do so." In fact, only Banner was ordered to return the boat (R. 395-396, 107-108) and only Banner was found in contempt. (R. 118-119) J. R. Klingaman is not even a party to the Agreement (R. 87) and the Fla. Circuit Court carefully never even said that it retained jurisdiction over her. (R. 395-396, 107-108) For more facts and argument, please see Petition 14-15, 23, 44-45, 47-50 and 62-69.

7. M. L. Sommers wrongly implies that the Agreement provides for "money damages" for "failure to pay the agreed upon rent." In fact, the Agreement makes no such provision and does not even contain the word "rent" or a synonym. (R. 80-87) For more facts and argument, please see Petition 14-15, 18-20 and 72-76.

ARGUMENT

1. The pertinent Agreement is a District of Columbia contract. (R. 87)

2. Banner sued M. L. Sommers because M. L. Sommers breached the Agreement in 1975 and 1976. (R. 77-79) The forum was Florida because of the boat's situs there. For more facts and argument, please see Petition 13, 21 and 80-84.

3. If the Final Judgment (R. 1) rests on Florida contract law, it must also rest on the Florida Constitution and on Florida law re damages, which require:

a. No person shall be deprived of property without due process of law. (Fla. Const., 1968, Art. I, Sec. 9)

b. Reasonable and adequate notice of claim. (6 Fla.Jur., Constitutional Law, Secs. 320, 322, 325; 9A Fla.Jur., Damages, Sec. 134)

c. Ample opportunity to be heard re liability and damages. (6 Fla.Jur., Constitutional Law, Secs. 320, 322, 326; 9A Fla.Jur., Damages, Sec. 137)

d. Proof of claimant's attempted mitigation of damages. (9A Fla.Jur., Damages, Secs. 23, 24, 96)

e. Claimant's recovery is limited to

the amount necessary to restore him to the position in which he would have been if the alleged breach had not occurred. (9A Fla.Jur., Damages, Sec. 27)

However, in entering said Judgment, the Fla. Circuit Court failed to meet even one, let alone all, of said requirements. For more argument, please see Petition 33-79.

4. Notice analogous to original process was required before Petitioners were ordered to pay money to M. L. Sommers. For argument, please see Petition 67.

5. The Fla. Circuit Court was obliged to completely investigate the circumstances of J. R. Klingaman's being added as a party, particularly after receiving her Motion to Remove Name from Action (R. 113-117) well before entering the Final Judgment. (R. 1) The Fla. Circuit Court was obliged to set aside her apparent but unauthorized appearance. (St. Lucie Estates v. Palm Beach Plumbing Supply Co., 133 So. 841, 101 Fla. 205) But the Fla. Circuit Court's only expressed concern was with who had all the money! (R. 328) For more argument, please see Petition 33-35 and 36-61.

6. Petitioners' argument re out-of-state

personal property is no more a sham than the following analogous cases heard by the U.S. Supreme Court:

a. Overby v. Gordon, 177 U.S. 214: The jurisdiction of a state court does not extend to and embrace property not situated within its territorial jurisdiction.

b. Green v. Van Buskirk, 74 U.S. 139: The dominion of a state over personal property situated within the state is complete.

7. After the boat had been outside of Florida for five months, the Fla. Circuit Court suddenly, without notice or ample opportunity to be heard, transformed the action from an equity case of Banner vs. Sommers into a money case of Sommers vs. Banner and J. R. Klingaman. (R. 343-397, 107-108) Petitioners submit that the boat's situs outside of the Fla. Circuit Court's territorial jurisdiction created a lack of jurisdiction for said Court to order the boat returned to Florida and to enter the money judgment which flowed therefrom. Petitioners further submit that M. L. Sommers was therefore obliged to begin anew in the Maryland or Federal Courts. For more facts and argument, please see Petition 13-15, 22-23, 35-36, 61-79 and 80-84.

CONCLUSION

Petitioners respectfully petition the U.S. Supreme Court to issue a Writ of Certiorari to both the Fla. Supreme Court and the Fla. District Court.

Respectfully submitted,
David E. Klingaman, trading as
Banner Sightseeing Company, and
Joy R. Klingaman

CERTIFICATE OF SERVICE

This is to certify that three copies of the foregoing Reply Brief have been furnished to Respondent, Mr. Martin L. Sommers, 1380 Barbizon Lane, Naples, Florida 33942, by first class mail, postage prepaid, this 9th day of March 1979.

David E. Klingaman, trading as
Banner Sightseeing Company
Petitioner